TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 751.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY, PLAINTIFF IN ERROR,

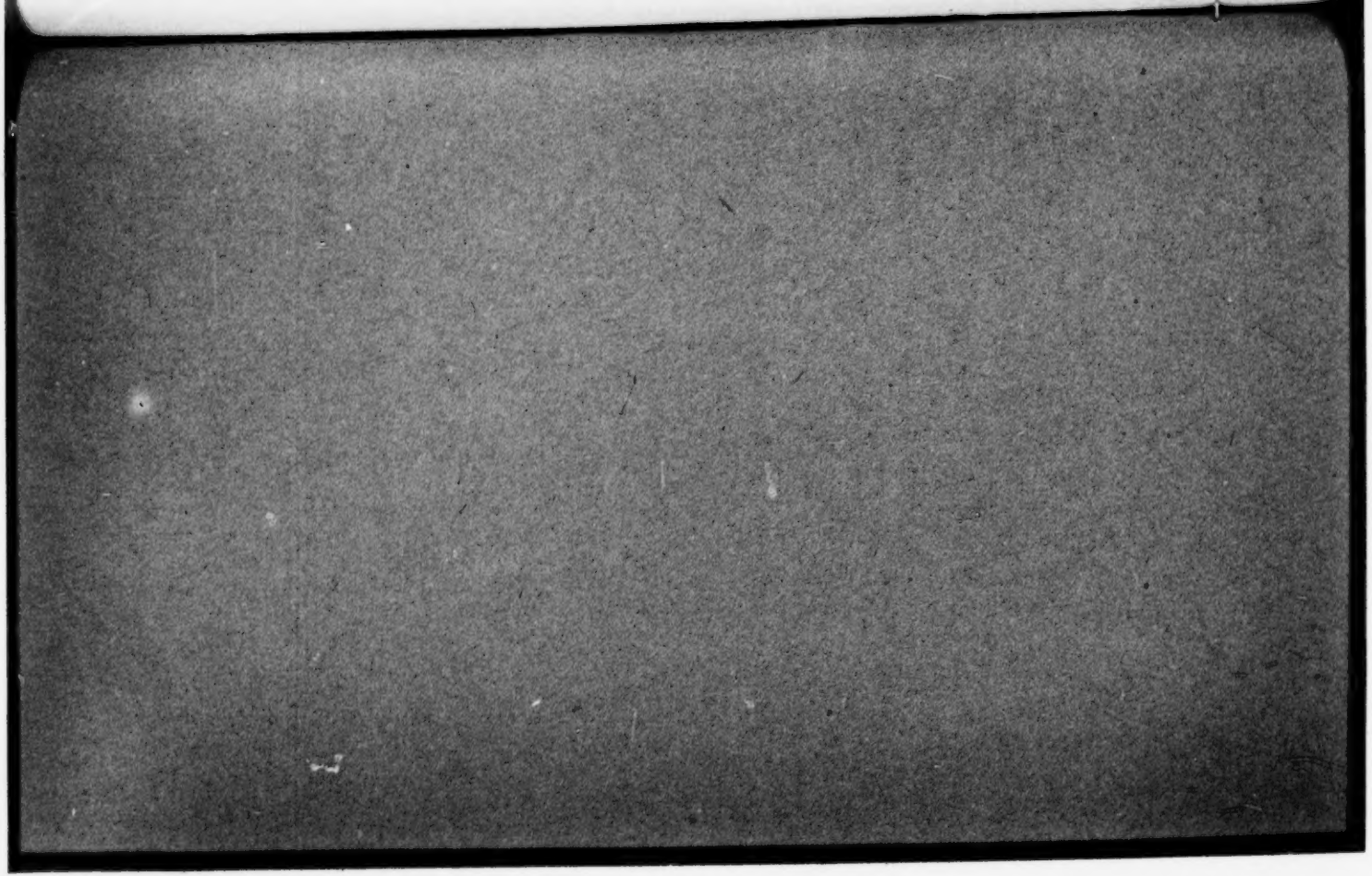
vs.

LIZZIE THOMPSON.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

FILED OCTOBER 15, 1913.

(23,902)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 7, 1914.

1 STATE OF GEORGIA,
County of Richmond:

To the City Court of said County:

Lizzie Thompson, as plaintiff, brings this action against the Charleston & Western Carolina Railway Company, as defendant, and shows:

1. Plaintiff is a resident of said county of Richmond, and defendant is a corporation existing under the laws of the State of South Carolina, but doing business and having agents therefor located in said State of Georgia and in said County of Richmond.

2. Said defendant is a common carrier, owning and operating a line of railroad between the City of Augusta in the State of Georgia, and the city of Spartanburg in the State of South Carolina.

3. On October 16, 1910, plaintiff was received by said defendant company as a passenger on board its cars at the town of McCormick in the State of South Carolina, for safe transportation to the City of Augusta, Ga., and said plaintiff paid full and regular fare for transportation, and became entitled in every way to the full measure of care and diligence imposed by law on common carriers for the transportation of passengers.

4. While plaintiff was occupying a seat as a regular passenger in one of the coaches of defendant company at a point about half way between McCormick and the next station, Plum Branch, in the State of South Carolina, the train on which plaintiff was riding
2 rushed into a head-on collision with another train on the same track belonging to defendant company, and going in the opposite direction from Augusta toward Spartanburg.

At the first warning of danger, plaintiff grabbed for her two little children who were riding with her, and then she was knocked violently across the end of the seats striking her side upon them, and was also struck on the head by some heavy timber or material from above, and at the same time was mashed, injured and bruised in her side, back, hip and leg—which blows knocked her unconscious for a time. Then she became conscious for a short while, and remembered about her children, and went to one of them which was lying on the floor under a seat as if dead, and the other child was knocked out of the window on the ground, and was subsequently brought to plaintiff by the news butcher on the train. Then plaintiff became unconscious again, and remained so until about 12 o'clock on the night of the injury—the injury itself having occurred about 5 o'clock P. M. of that day.

Plaintiff was brought down that night from the scene of the injury to Augusta, Ga., and was not conscious during the trip until she was taken off at the depot in Augusta, and carried to the Lamar Hospital, where she remained for two weeks, part of the time being unconscious. She was subsequently obliged to stay in bed at home

for about two weeks, and after improving to some extent, she
3 found that her legs would give way under her unexpectedly when she was endeavoring to walk, and subsequently has been obliged to remain in bed much of her time, and a rising or swelling in her left side has also resulted from her said injuries.

Said injuries so sustained by plaintiff were not merely external and temporary, but affected her internal organs, seriously injuring both liver and kidneys, and have permanently disabled her, as plaintiff believes for the rest of her life.

5. The head-on collision of said two trains belonging to defendant company occurred without any fault on the part of plaintiff, and the consequent injuries could not have been avoided by her through the exercise of any ordinary diligence on her part.

6. Said head-on collision and the consequent injuries to plaintiff were caused by the negligence of defendant company as a common carrier in violation of its duty to plaintiff as a common carrier, and plaintiff specifies the following acts of negligence:

(*a*) Allowing two trains on the same track to run together in opposite directions.

(*b*) In permitting train No. 3 on which plaintiff was coming to Augusta, to leave McCormick without holding at Plum Branch or other siding station, train No. 8 coming up from Augusta.

(*c*) In permitting train No. 8 coming up from Augusta to leave Plum Branch without holding at McCormick or other siding
4 station, train No. 3, on which plaintiff was coming to Augusta.

(*d*) In not keeping, through its engineers and conductors, a proper lookout on each of said trains for danger ahead on said track.

7. By reason of the negligence of defendant company as aforesaid, plaintiff was severely injured, and she has ever since suffered the most intense physical pain, in addition to the mental anguish she endured through fear of impending death at the time of the collision and since, and from the nature of the injuries she will continue to suffer physical pain and mental anguish from the consciousness of her physical injury and loss of ability to labor, and the dread of sickness and death ensuing therefrom, all to the damage of your petitioner in the sum of $1,999.

Wherefore, plaintiff prays:

1. That judgment be rendered for her against defendant company for the sum of $1,999.

2. That process issue directing defendant company to appear at the next term of said court to answer this complaint.

WM. H. FLEMING,
Attorney for Plaintiff.

5 STATE OF GEORGIA,
Richmond County:

LIZZIE THOMPSON
v.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

To the Sheriff of said County or his lawful Deputy, Greeting:

Process.

The defendant, Charleston & Western Carolina Railway Company is hereby required, in person or by attorney, to be and appear at the City Court next, to be holden in and for the County aforesaid, on the first Monday in March, 1911, then, and there — answer the plaintiff in action of damages, etc. As in default of such appearance, said court will proceed thereon, as to justice may appertain.

Witness the Honorable William F. Eve, Judge of said Court, this 13th day of March, 1911.

GEO. B. POURNELLE,
Deputy Clerk.

STATE OF GEORGIA,
Richmond County:

I have this day served the defendant, W. L. Humphreys, Chief Clerk, C. & W. C. R. R. Co., with a copy of the within petition and process, personally, this 17th day of February, 1911.

N. O. G. WHITTLE,
Deputy Sheriff, R. C. Ga.

6 Filed in office February 13, 1911.
WM. D'A. WALKER, *Clerk.*

7 City Court, Richmond County, March Term, 1912.

LIZZIE THOMPSON
v.
C. & W. C. RAILWAY CO.

Amendment to Petition.

Now comes the plaintiff in the above stated case, and amends her petition, by adding the following paragraph, to wit:

She reaffirms her statement in her original petition that she bought her ticket and paid her fare from McCormick to Augusta on the trip mentioned in said petition; but she further alleges that even if it be true as testified by one of defendant's witnesses, that she was riding on the free pass introduced in evidence, she was nevertheless a passenger on said train, and is entitled to recover in this action, because

the law will not permit a common carrier to make a contract to excuse it from its own negligence in regard to injuries to passengers.

WM. H. FLEMING,
Att'y for Plaintiff.

Allowed this Jan. 17, 1912.

Filed in office Jan. 17, 1912.

D. KERR, *D'p'y Clerk.*

8 City Court of Richmond County, March Term, 1911.

No. 10.

LIZZIE THOMPSON
v.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

Answer.

And now comes the defendant and in answer to the petition in the above stated case says:

(1) It admits the allegations of paragraph one;
(2) It admits the allegations of paragraph two;
(3) It denies the allegations of paragraph three;
(4) It denies the allegations of paragraph four;
(5) It denies the allegations of paragraph five;
(6) It denies the allegations of paragraph six;
(7) It denies the allegations of paragraph seven.

W. K. MILLER,
Defendant's Attorney.

Filed in office March 14, 1911.

D. KERR, *D'p'y Clerk.*

9 City Court, Richmond County.

LIZZIE THOMPSON
v.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

And now comes the defendant and objects to the amendment offered by the plaintiff and says that it is not issuable; that there is no new fact alleged that this defendant can traverse; and further it is in the alternative, and defendant objects to it as an amendment.

Subject thereto and not waiving the same defendant moves that the plaintiff be required to elect upon which theory advanced by this amendment she will rely, whether as a passenger who has paid her fare, or as the user of a free pass.

Subject to this motion to elect and not waiving the same defendant demurs to the petition as amended, because it sets out no cause

of action against it, and because it appears that plaintiff was traveling on a free pass, which exempted defendant from liability for injury to her person, and as such had no right of action against this defendant for the damages received, and because no copy of the pass is attached to the petition.

Subject to the foregoing and not waiving the same defendant amends its answer and says: That plaintiff was gratuitously carried on its train, she riding on a free pass from McCormick, South Carolina to Augusta, Ga., which provided among other things
10 that "The person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same. I accept the above conditions."

And defendant pleads the same against the plaintiff and in bar against her suit and says that she was not a passenger for hire as alleged and that defendant is not liable for the injuries for which she sues.—Said pass being issued to plaintiff as wife of an employee gratuitously under the acts of Congress known as the Hepburn Act of June 1906. Sec. 1.

Jan. 16, 1912.

W. K. MILLER,
Def't's Att'y.

Filed in office Jan. 17, 1912.

D. KERR,
D'p'y. Clerk.

On motion of plaintiff's counsel the within amendments to defendant's defense are hereby stricken.

This Jan. 17, 1912.

WILLIAM F. EVE,
Judge, City Court, R. Co., Ga.

11 City Court, Richmond County, January Term, 1912.

LIZZIE THOMPSON
vs.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

The court having on motion of plaintiff struck the amended demurrer and amended answer of defendant, wherein it set up that plaintiff could not recover because injured while traveling on a free pass as set out in said answer,—on the ground that it set up no defense—now comes the Charleston & Western Carolina Ry. Co. and except- thereto, and say- that the court erred in striking said answer and in refusing defendant any relief thereunder, and prays that these its interlocutory exceptions be signed and entered of record.

Jan. 17, 1912.

W. K. MILLER,
Def't- Attorney.

I do hereby certify that the foregoing Bill of Exceptions is true, and the Clerk of this Court is directed to enter the same of record for future assignment of error.

In City Court, Jan. 17 1912.

WILLIAM F. EVE,
Judge, City Court, R. Co., Ga.

Filed in office Jan. 17, 1912.

D. KERR,
D'p'y. Clerk.

12 We, the Jury find a verdict for Plaintiff in a sum of $1,300 (Thirteen Hundred Dollars).

1/7/12.

F. M. CLARK, *Foreman.*

Whereupon it is adjudged that the plaintiff, Lizzie Thompson, do recover of the defendant, the Charleston & Western Carolina Railway Company, the sum of Thirteen Hundred Dollars, and the further sum of — dollars costs.

This January 19, 1912.

WM. H FLEMING,
Attorney for Lizzie Thompson..

13 City Court, Richmond County,

LIZZIE THOMPSON
v.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

Verdict for Plaintiff, Jan. 17, 1912.

The defendant, the Charleston & Western Carolina Railway Company, being dissatisfied with the verdict and judgment in the above stated case, now comes at the term at which said trial was had and before the final adjournment thereof, and within thirty days from said trial, and moves the court for a new trial upon the following grounds, to wit:

(1) Because the verdict is contrary to the evidence and without evidence to support it;

(2) Because the verdict is decidedly and strongly against the weight of evidence.

(3) Because the verdict is contrary to law and the principles of justice and equity.

Wherefore, movant prays that these, his grounds for new trial, be inquired of by the Court, and that a new trial be granted.

W. K. MILLER,
Attorney for Movant.

The grounds of the foregoing motion for new trial *is* hereby approved as true and correct.

This 18 day of January, 1912.

14 WILLIAM F. EVE,
Judge, City Court, Richmond County, Ga.

Service acknowledged of a copy this Jan. 18, 1912.
Rule Nisi waived.

WILLIAM H. FLEMING,
Att'y. for Pl'ff.

Filed in office Jan. 18, 1912.

D. KERR,
D'p'y Clerk.

15 City Court Richmond County.

Verdict for Plaintiff.

LIZZIE THOMPSON
vs.
CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY.

Amended Motion for New Trial.

And now comes the defendant and amends its motion for new trial of file in the above stated case, by adding thereto the following grounds, namely:

4. Because the verdict is excessive in view of the newly discovered evidence set out in ground No. 8.

5. Because the court refused to charge the jury, pursuant to requests made in writing at the proper times, as follows:

Plaintiff alleges that she was a passenger and had paid her fare, while defendant contends that she had not paid such fare but was traveling on a free pass. If you find from the testimony that she was traveling on a free pass, and that such pass contained a provision that the person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from the negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same,—then I charge you that she would not be entitled to recover for the injuries for which she sues." And defendant says it was error not to give such

16 charge, that plaintiff was traveling on an interstate pass, issued to wife of laborer under and as provided by Act of Congress,—the Interstate Commerce Law.

6. Because the court refused to charge the jury, pursuant to request made in writing at the proper time, as follows:

"A stipulation in a free railway pass requiring the user to assume the risk of injury due to the carrier's negligence is binding on the person accepting the privilege, although notice of such stipulation may not have been brought home to him."

7. Because the court refused to charge the jury, pursuant to request made in writing at the proper time, as follows:

"The testimony of a party who offers herself as a witness in her own behalf is to be construed most strongly against her, when it is self-contradictory, vague or equivocal, and unless there be other evidence tending to establish her right to recover she is not entitled to a finding in her favor, if that version of her testimony most unfavorable to her shows that the verdict should be against her."

W. K. MILLER,
Def't's Att'y.

Service acknowledged of a copy of the with- motion for new trial, filing waived.

Service also acknowledged of the brief of evidence—filing
17 waived.

April 25, 1912.

WM. H. FLEMING,
Att'y for Lizzie Thompson.

Grounds approved, July 11, 1912.

WILLIAM F. EVE,
Judge City Ct., R. Co., Ga.

18 (Extracts from Brief of Evidence.)

LIZZIE THOMPSON, called on her own behalf, being duly sworn, testified as follows:

Direct examination:

I was living in Augusta in October, 1910. My mother lived at Plum Branch, South Carolina. I made her a visit in October, 1910. I went to see my mother on the 15th of the month. It was on Saturday. Going there I left on the train that leaves here at four o'clock. I went to McCormick. I started to return to Augusta Sunday evening, the 16th. I bought a ticket at McCormick to come to Augusta. I paid $1.20 for it. I had my two little children with me. They were not old enough for tickets. I got on the train. I don't recall now what time it was but it was between 6 and 7 o'clock, I suppose. I don't know the schedule but it was about sun down. I was sitting on the right hand side coming down, the second seat behind the news butcher. I was sitting on the inside seat. The children were on the other side, next to the aisle. Very little I know about the wreck, but what I remember was when the train was running different from what it was and I knew something was happening and sprang to my feet to protect my children, and when
19 I spring to my feet something hit me in the head and knocked me against something, I suppose it was the seat, and when I come to myself I was bent over something, and I went to hunt for my children and found one. She was under the seat like she was dead, and I thought about the other one, and she was brought to me as wet as anything. How we got out of the train I

am unable to tell. My wound was in the side and in my head. I have pains in my side and in my foot. I wear 4's and I have to wear 6's now on this foot, and I can't work and before I got hurt I was getting from $25 to $30 a month, and a man staying with me paid $7 and another party $6, and I made other extra money, and that was my custom to help work and support my family. Since I have been hurt I can't work at all. I was sitting on the inside of the seat and I realized something was about to happen from the way the wheels were going. Then I grabbed my children. Then something struck me on the head and I was knocked against something. I was struck right across here. I was unconscious for a while and when I come to my senses the first thing I remembered was my children, and I got unconscious again and don't remember anything else until I was in Augusta in the shed. I say I saw one child on the floor. The news butcher brought her to me and she was as wet as she could be. She was wet with water; I don't know where it came from. I did not know when they took me out of the car. I don't remember when they laid me on the
20 ground. I don't remember Gary Seigler coming to me. It came to me as a dream; I remember my mother. That is the only thing I remember, is my mother. I do not remember anything at all about my trip on the car to Augusta. As to whether I was conscious at all out at the station, I will say: I remember when they taken me off the train at the station. When I next came to myself I was in the Lamar Hospital. While I was there I had my mind part of the time and part of the time I didn't. The reason I couldn't feel my misery there they kept my arms punctured. It was after I left the hospital I began to feel my misery and it got so bad I sent for a doctor. My side begun to swell and he gave me some chloroform liniment to bathe my side, and when I kept that on my misery wasn't so bad. He came back and gave me medicine in a bottle and put a plaster on my side and then my misery got worse. That was Dr. Doughty. I passed something looked like blood, and I called my next door neighbor and showed her and she said "Don't be scared, it is just passing that soreness off," and I didn't get better and sent for Dr. Cleckley and he removed that plaster and give me something else. Dr. Doughty was employed by the railroad. He treated me at the Lamar Hospital. I employed Dr. Cleckley. My husband employed him. The blow in my head did not cut my scalp. I didn't have any hat on my head at all but I had a roll of hair they calls a rat, and it was the first time I
21 wore one. It cut that rat in two. I did not know what it was struck me on the head. I stayed at the Lamar Hospital two weeks. Then I went home. As to what doctor, if any, besides Dr. Doughty treated me at the hospital, I will say: I didn't know the names of the doctors out there. They kept me punctured. I went home in two weeks. I went there on the car. There was another man and his wife in the hospital and he was out there to see her and he helped me on the car, and I was unable to walk and he carried me home. He lead me home. If he had not been with me I couldn't have got home. I live at 519 Calhoun Street. After

I got home I stayed in bed off and on ever since, up some weeks and down some weeks until July gone. I never have recovered from the pain in my side. I can't even wash for myself and I can't sweep the floor. I don't know the day of the month I had Dr. Cleckley to come to see me, but it was in January, I think. I just remember now. My recollection is not very good, but it was near Christmas. I don't know whether it was before or after. I had Dr. Brown besides Dr. Cleckley.

Cross-examination:

I had Dr. Brown about in March 1911. I live at 519 Calhoun Street. I have lived there from July to March. From July 27th, 1910. I lived at this place on Calhoun Street two or three months before I was hurt. Before then I stayed up on Hopkins
22 Street, 719, I think. I didn't live there but one month, I think. Before that I lived at Plumb Branch. I came to Augusta in March before that injury, and that injury was in October. I came to Augusta in March of the year I have testified about. I said I took in washing and supported myself.

Q. And made $25 a month; who did you wash for?

A. Mrs. Goodrich over there on Reynolds Street $2.50 a week, and then a lady down there on Calhoun Street the second door from me, I washed for her and she paid me .75 a week. Those was the only washing- I had at that time. I left them in the house when I was hurt, and they had to send and get somebody else to do them. If I was making $2.50 a week at one place and .75 another, that was $3.25 a week right there; that is my washing. I had one of my rooms rented out for $6. I rented it to a woman by the name of Maggie Ross. I got $6. a month for that. I had another room rented out for $5. That was J. T. Timpson, and I was doing his cooking for .50 a week. That was $7. As to whether I rented rooms to Maggie Ross and Timpson, for which I got $11 a month, I will say: I got $6 from Maggie and $7 from J. T. $5 for the room and $2 for doing his cooking. I supported myself with the support of my husband. He was helping me support the family. We had to live and pay for groceries and house rent and furniture bills. We had two children. I was in good health all this time I
23 lived in Augusta. I never had been sick up to the time I was hurt; I never had a spell of sickness in my life. I did not have any trouble with my husband, no more than family crosses. All families have their trouble; yes sir, me and my husband had troubles like everybody else. We quarrelled. If he made me mad I struck him. He did not ever strike me. He did not ever kick me. He never laid any violent hands or foot on me, he never hit me, with his foot or struck me in his life. I never was sick. I never called a doctor before this for no sickness but female trouble, only in the birth of my children. Only in child birth, that is the only sickness I ever had in my life. My husband worked on the C. & W. C. Railroad. That is the railroad I am suing. He was working on the track. He was a track hand. He worked out there in the yard. This yard here in Augusta. When I went to McCormick

Saturday afternoon I did not go on a pass. I bought my ticket here in Augusta. I never rode to McCormick on a pass. I never rode on a pass in my life. What sort of looking thing is it? I never heard about pass before.

Redirect examination:

This pain and trouble about my side has not ever left me at all since then. I did not ever have anything of that kind or character before. I am not able to do work. When my husband went to Savannah to get more money, I had to have a doctor down there. I was not able to do nothing.

Witness excused.

24 LIZZIE THOMPSON, recalled on her own behalf, testified as follows:

Direct examination:

My husband never did kick me. He never has hit me with a stick or his foot in his life. I am the one lived with him and I ought to know. He never hit me. I heard Dr. Williams say he went to see me. He called in my house to see my child. She had a rising on the neck and he said if he lanced that rising it would cause an ugly place on her neck and I took her to the City Dispensary and the doctors treated her and that place went away. Dr. Williams never attended me outside of that call at my house on my child. He called on my child, not on me. This fellow, Jim Timson, said he saw my husband kick me in the stomach, and that I was laid up several weeks afterwards. No sir, my husband never has hit me so I quit working. Me and him had our little quarrels like anybody else. You ask Jim Timson if he didn't leave my place and jump his board. Yes sir, the pay day in October on the 10th, Jim Timson said he couldn't get his money that a woman had put a garnishment over it and as soon as the woman came off the gang he would get the garnishment taken off and pay me, and he hasn't paid me yet. He owed me $15 when he jumped his board. You asked him if I carried his meals to the yard. Yes sir, I carried his meals to the yard. Even to the white men to the yard has seen me
25 going to the yard and carrying Jim Timson's meals. I carried them in a basket and you want me to tell you absolutely and squarely if I know anything about that paper (pass). I don't know anything about it. This is the first I saw of it. I bought my ticket at McCormick and it was a blue ticket. I gave it to the conducor. He didn't ask me to sign it. I always sign for myself. I can write my name.

Q. Take this paper and writ- your name. (Witness writes name.) I am in the habit of signing my name instead of my mark. I never did have anybody put my mark to a paper, because I write my name so when it comes to me again I know it.

PLAINTIFF: I offer her signature here in evidence. (Marked J. C. H. No. 3.)

That negro man that said he was on the train coming down that night, George Harmon, says he sat down on the seat by me coming down on the train that night and talked to me and I admitted to him I was riding on a pass. I did not. As far as I remember I was laying down that night coming to Augusta. They laid me down on the seats. I was not sitting up at all. I was laying down because I couldn't sit up. When I come to at the depot I was lying down. I did not have any conversation with that man, George Harmon, about riding on a pass. I did not ever ride on a pass before. I never seen one before until today.

26 Cross-examination:

As to whether I saw George Harmon on the train, I will say: Well, George was on the train. To tell the truth, I don't remember because it came to me as a dream. As to whether I recall seeing him on the train, I will say: If George was on there I don't know it because I told you the thing come to me as a dream. If he was on there I don't remember it. I don't recollect what happened on the train or what I said. I don't remember introducing myself to him and telling him I was George Thompson's wife. I don't recall that he was on the opposite side of the aisle before the accident. I don't recall seeing him there before the accident. In reference to buying a ticket, I testified that I had never ridden on a pass in my life. I don't know how long my husband has been an employee out there. I bought a ticket because I didn't have no other way to go home. I didn't ask for a free pass. I didn't use a free pass. I didn't know that my husband could get me one; I didn't ask him for one. The names of my children are Willie Alpha and Rosa Lee. My husband calls them that. I can read.

Redirect examination:

Q. Were you present out there after adjournment at dinner when Jim Timson——

—. I was present and I heard Jim Timson say something about his testimony here this morning. When I went out there in
27 the hall he said "You done wrong", and I said "What?" and he said "You ought to come to me first" and I said "What did I have to come to you for?" and he said "If you come to me and spoke to me before this man I would have come on your side," and I said "What you tell them I didn't bring your dinner for?" and he said "You did bring it over some times but not very much."

Cross-examination:

He said he didn't know what he was called upon to do when he came here. As to whether he said if I had come to him he would have testified I brought his dinner to him two or three times, I will say: He said if I had spoke to him as a witness he would not have testified on that side, because he was out for the money like the others, and he looked for something out of it. As to whether he said

anybody had promised anything, I will say: I never asked him about that because it wasn't my place. My oldest child is Rosa Lee. She was born in 1906. The other one is named Will Alpha. It is a girl. I have not ever called that child Georgia. I never have. Her father never called her Georgia; that ain't her name. Those are my children I had on the train that day. One of them is in bed sick from her injury now.

Q. That is not the question here. I suppose there is another suit for that. The children that accompanied you that —, were they your children?

A. Yes, sir. I don't know what make Jim Timson make
28 this statement to me, that if I had called on him he would have testified for me. I never asked him. He said "This is where you were wrong. You ought to have seen me before this gentleman came down" and I said "Seen you about what?" and he said "I didn't know what they were coming for," and he said "I didn't go to hurt you in the hearing," and I said "That is all right. Only one thing you told wrong; that I didn't bring your dinner to you, and you ain't seen George kick me." and he said "No." He said "If he swear George hit me or kick me, he wouldn't tell the truth. He said he didn't know what he was coming here for. I seen Jim before he came up here after that man seen him in Savannah. I don't know how far I live from him in Savannah. I don't know where he lives. I live on Littlejohn Street. Jim does not live there.

Witness excused.

GEORGE THOMPSON, recalled testified as follows:

Direct examination:

I am Lizzie Thompson's husband. I did not any time during July, August, September or October 1910 kick my wife in the stomach. I never have kicked her, no sir. I never heard it before today, that I kicked her.

Cross-examination:

29 I never heard of it before today. I never dodged the police since I have been in Augusta. I id not ask Mr. Davenport to hide me out, that the police were hunting me for kicking my wife. I did not ask him anything like that at all. As to what I asked him, I will say: Nothing like that at all. I did not tell him I was dodging the police. Nobody else told him in my presense. I did not know he was doing it. Maggie Paul and Jim Timson lived at my house in September 1910. Timson did; I don't know a man named Templeton. Maggie stays in Savannah, I think. I work for Mr. Luckbaum in Savannah. I was working in the yard for the company at that time. Capt. Davenport was my boss. I guess that is the gentleman that was here today. I have seen him out there. That is the same man I worked for. I have not ever applied for a pass for my

wife. I did not. I have not done it once or on several occasions; I never have. I have got a pass from the company for myself, but I never got one for my wife. I had just been paid off and my wife taken what money I had and she lost it. I had $15 and I kept $2. As to what I gave her money for when she was making $15 or $20, I will say: That was all right; she was making more than I was. As to whether she was supporting me instead of me supporting her, I will say: I was putting ours together. I was working at $1 a day and didn't have very much to put in. I didn't ask for a pass for my wife and children. As to whether I let her spend her money when I could get a free pass, I will say: Whenever I asked for a pass for myself I have to go several times before I get it. I never asked for a pass for my wife. I was not willing to have her spend her money when she could ride free.

30

Redirect examination:

My name is George Thompson. I did not ever spell it "Thomasson."

Recross-examination:

I did not ever spell it at all. I can write. My name stands on the books of the company Thompson. The names of my children are Willie and one named Rosa Lee. Willie was on the train at the time of the wreck, I guess. I guess she was on that train. She went off with her mother. I couldn't tell where either was until after she was hurt. They left here Saturday evening. I did not buy the ticket. I suppose she did. I was working. I did not get her any pass.

Redirect examination:

I have not got a little girl named Georgia. One is named Willie and one Rosa Lee. I did not ever tell Mr. Davenport I had one named Georgia. I never told him nothing about my children.

Recross-examination:

I did not go with Mr. Davenport into Mr. Porter's office and give their names to the stenographer. I did not. There was a man on the gang with me named Sam Thompson. There was not one named George. My wife's name is not Georgia. It is Lizzie. I don't know Sam's wife's name. I know he has a wife, but I don't know what her name is. It is not Lizzie.

31

Witness excused.

E. DAVENPORT, a witness called on behalf of the Defendant, being duly sworn, testified as follows:

Direct examination:

My position in the summer of 1910 was yard foreman down at the joint yard. I had one, George Thompson working for me at

that time. George Thompson made a request to me for transportation for his wife and two children to McCormick. I made the request to Mr. Porter's office, and he sent it to Mr. Anderson's office and he got the pass himself. He told me he got it. That was on the Saturday before this collision. I say on Saturday before the collision George Thompson, a section hand under me, requested a pass for transportation for his wife and two children to McCormick and back. I had given him a pass before that. I gave a pass for his mother in law to come and stay with his wife when he said she was sick. That was in September. I did not say when he came back, George Thompson showed me this pass. I asked him if he got the
32 pass, and he said yes. I did not see the pass and examine it.

Cross-examination:

I didn't see this pass at all. I didn't issue this pass; Mr. Anderson did. I did not issue it; I gave him a request for it. I did not see it. I didn't issue it. All that I know about its being issued is not what he told me. I got the request from Mr. Porter's office and gave it to him and he carried it to Mr. Anderson's office. I don't know that the pass was issued, only that he told me. All that I know about its being issued is not what other people told me; I gave him the request for it.

Redirect examination:

He reported to me that he got the pass, and he couldn't get the pass without the request of the man that he works —. Mr. Anderson's office issues the pass. He told me that he got this pass.

Witness excused.

E. DAVENPORT, re-called on behalf of the defendant, testified as follows:

Direct examination:

I was the yard man having charge of George Thompson, who asked for a pass.

Cross-examination:

33 That was out in the yard. He was working for me in September. He was working for me a year. We went up on Broad Street to load some ties, and George——

Redirect examination:

This request for a pass states the information that was furnished me by George. That is the request I handed to him out of my own hand. I handed it to George and told him to go to Mr. Anderson's office and get the pass. I took George in Mr. Porter's office and he gave the names to Miss Fannie May so she could make it out. She is the stenographer in Mr. Porter's office, and she handed it to me and I gave it to George. He told me afterwards he got the pass.

Witness excused.

J. HERNLEN, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

I am conductor on the C. & W. C. Railroad. I have been conductor 33 years. I had control of a train in the fall of 1910, from McCormick, S. C. to Augusta, Ga., that has been testified about. We had a collision that day. That woman was a passenger on my train; I taken up a pass from her for Lizzie Thompson and
34 two children. This is the pass. Here are my punch marks in that. That is the same punch I use every day. I have been using this punch about 10 years. It is worn some and don't cut thin paper well. She had two children with her. The cross mark you see on the back of it, I asked if she could write her name and she put the cross mark there.

DEFENDANT: I offer this pass in evidence (Marked J. C. H. No. 1).

No Cross Examination.

Witness excused.

J. HERNLEN, re-called on behalf of the defendant, testified as follows:

Direct examination:

I had one George Harmon and his son, I think from Bartow, travelling on a pass the same day this woman was. I have a report of it. This is the regular report. I reported George Harmon travelled that day on a pass. There were some others on a pass, from Mt. Carmel. This plaintiff is on the report, "Lizzie Thompson and two," that is her two children.

Cross-examination:

It seems according to my report she didn't come on here as a passenger to Augusta; I just dittoed it. I was fixing to report it when the collision happened. I have one from Latimer to McCormick. One from Bordeau to Augusta; another one from Bordeau to Augusta. One from McCormick to Clark's Hill; that one
35 ought to be Augusta. I just dittoed it. That ditto means the same thing as above, but I know what it ought to have been. I had not got through with it. She made that cross mark on the back of it herself, and I asked her could she write it, and she said no, and I said "Here make your mark." As to whether they usually write their name if they can't and then make the cross mark, I will say: I didn't have time to go through all of that. 8 out of 10 can write their name but can't write on a train running along. Her name don't appear on the back of the pass, but she rode on the pass.

Redirect examination:

In other words my experience is lots can write in the court house and on a desk, but can't write on a train running.

Witness excused.

W. L. HUMPHREY, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

I am Chief Clerk of the General Manager's office of the C. & W. C. Railroad. I was such on October 15, 1910. This is a trip pass in favor of Lizzie Thompson and two children from McCormick to Augusta, one way. It was issued in our office. I signed it.
36 That is my signature on there.

Cross-examination:

This paper reads this way "Lizzie Thomasson." I don't know who she is; she is the party in whose favor it is issued. We have not a negro in our employment by the name of Thomasson, that I know of; I don't know all of the employees. This was issued as the wife of an employee. As to whether I know a man working for us at that time by the name of Thomasson, I will say: I don't know anything of that. We issue the pass under the recommendation of the employees of the road under whom the man is employed. This is issued to Lizzie Thomasson.

Redirect examination:

This is the request for the pass sent in to me. Upon that I issued it. Mr. A. H. Porter's name is signed to that. (Marked J. C. H. No. 2.)

Witness excused.

Miss FANNIE MAY, a witness called on behalf of the Defendant, being duly sworn, testified as follows:

Direct examination:

In October 1910, I was stenographer in Mr. Porter's office, for the C. & W. C. Railroad Company. I saw this letter before, and wrote and signed it. Mr. Porter's foreman came in the office with
37 one of the colored men and asked Mr. Porter if he would give a request for a pass for the negro's wife and two children, and Mr. Porter told me to write the request for the pass. The man stood over my desk and gave me the names of his children, and I wrote the request.

Cross-examination:

I said the foreman of Mr. Porter came in—Mr. Davenport. This colored man Thompson came with him. I am sure they both came to me I can recall a year and 3 or 4 months the occasion that Mr.

Davenport and this negro man came in together to the office. What attracts my attention so much to it is, as a rule those requests were made through letters and this man came with him. I think it was a Saturday, and he brought this man with him and he stood over me and gave me the names when I wrote them.

Q. What if your recollection is different from Mr. Davenport's?

DEFENDANT: I refer you to his testimony. You understand, he went with him to get the request and he sent him to get the pass.

Redirect examination:

I wrote out this in my office, to Mr. Anderson. There was no pass issued there; we can't issue the pass.

Witness excused.

38 A. H. PORTER, a witness called on behalf of the Defendant, being duly sworn, testified as follows:

Direct examination:

I authorized this request on the General Manager. I was at my desk in my office Saturday morning, October 15th, it seems the day was, and Mr. Davenport came up to the office and brought with him a negro by the name of George Thompson, one of the laborers in the yard, and asked if I would secure a pass for George's wife and two children to McCormick and return. I didn't ask him for a formal letter, and turned to Miss Fannie and said "You make a request on Mr. Anderson for this pass" and she then called on Thompson for the names of the children, which is necessary to put in the request, and my recollection is she gave it back and Mr. Davenport sent Thompson to the office for the pass and he went back to work.

Cross-examination:

Passes for employees were issued in my offices, but not for their families. This one was not. I don't know anything about the issuing of the pass; I don't know whether it was issued or not.

Witness excused.

39 *Free Pass.*

EXHIBIT J. C. H. No. 1.

Charleston & Western Carolina Railway Co.

Trip Pass.

Pass Lizzie Thomasson & two Children, Rose and George, from McCormick, S. C. to Augusta, Ga., on account of Wife & dep't children Rdw. Lbr. Good for One Trip only until Nov. 15, 1910, when countersigned by W. L. Humphrey.

Date Oct. 15, 1910.

No. 12923.

A. W. ANDERSON,
General Superintendent.

In the Margin.

Countersignature:
W. L. HUMPHREY.

Not transferable.

On the Back.

This Free Ticket is not transferable, and if presented by another person than the individual named thereon, or if any alteration addition, or erasure is made upon it, it is forfeited, and the Conductor will take it up and collect full fare.

The person accepting this free ticket agrees that the
40 Charleston and Western Carolina Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.

I accept the above conditions.

X.
(Sign in ink or indelible pencil.)

Conductor will not recognize this pass until properly signed.

41 STATE OF GEORGIA,
Richmond County:

Be it remembered, That Lizzie Thompson brought her suit to the March Term, 1911, of the City Court of Richmond County, Georgia, against the Charleston and Western Carolina Railway Company, as appears of record, to which suit defendant appeared and filed its demurrer, as it appears of record. Thereafter said demurrer came on for hearing, and after argument had the court passed an order overruling the same; and said defendant being dissatisfied therewith, presented its interlocutory bill of exceptions, which were duly signed by the court May 24, 1911, and entered of record.

Thereafter the said case came on for trial on January 16th, 1912, when plaintiff amended her petition, to which defendant objected, as introducing a new cause of action, which amendment was allowed by the court over defendant's said objection. Thereupon defendant amended its answer by setting out that the plaintiff was being carried gratuitously on the train at the time of the collision for which she sued; that she was riding upon a free pass which provided that the person who accepted that free ticket agreed that the Charleston & Western Carolina Railway Company should not under any circumstances be liable for damages from negligence or otherwise to such person or property.

42 Upon motion of the plaintiff this amended answer of the defendant was struck by the court, and thereupon defendant filed interlocutory exceptions to this ruling of the court, which were duly signed by the court and entered of record, and which appear in the record. Thereafter a verdict was rendered for the plaintiff and defendant filed a motion for new trial, accompanied

by a brief of the evidence, the grounds of which motion and which brief of evidence were duly approved by the court according to law and came on for hearing in the said City Court on the 11th day of July, 1912, when, after argument had, the court passed an order overruling the same.

And defendant the Charleston & Western Carolina Railway Company being dissatisfied with said several rulings against it, and desiring to except to the Court of Appeals of this State, presents this its bill of exceptions, and says, that the court erred in said several rulings against it, and erred in overruling its demurrer, and defendant assigns error thereon under its interlocutory exceptions of file. Defendant says that the court erred in striking its said answer, setting out that the plainiff was riding on a free pass, and defendant assigns error thereon under its interlocutory exceptions of file, which accompany this bill of exceptions. And defendant says that the court erred in refusing to grant it a new trial upon each and every ground set out in the motion and amended motion for new trial, to which as they appear in the record reference is made.

43 And defendant specifies as the portions of the record to accompany this bill of exceptions to the Court of Appeals, the petition and amendment of the plaintiff, the demurrer of defendant and interlocutory exceptions to the overruling of same, the answer of the defendant and amended answer of defendant, the interlocutory exceptions of the defendant to the striking of its amended answer Jan. 16, 1912, the motion and amended motion for new trial, the brief of the testimony, and the order overruling the motions for new trial.

W. K. MILLER,
Attorney Charleston & Western Carolina Railway Co., Plaintiff in Error.

P. O. address, Augusta, Ga.

44 *Certificate.*

I do certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the City Court of Richmond County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the next term of the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 11th day of July, 1912.

WILLIAM F. EVE,
Judge City Court, R. Co., Ga.

LIZZIE THOMPSON
v.
C. & W. C. RY. CO.

Service acknowledged of a copy of the foregoing bill of exceptions and writ of error this July 11, 1912.

WM. H. FLEMING,
Att'y for Def't in Error.

45 STATE OF GEORGIA,
Richmond County:

Clerk's Office, City Court.

I, Geo. B. Pournelle, Deputy Clerk, City Court of said County, do hereby certify that the foregoing is the true original bill of exceptions filed in said office on the 11th day of July, 1912, in the case of Charleston & Western Carolina Railway Company, plaintiff in error, v. Lizzie Thompson, defendant in error, and that a copy thereof has been made and is of file in said office.

I further certify that the City Court of said County, June Term, 1912, has not been finally adjourned.

Witness, my official signature and the seal of said Court, this 18th day of July, 1912.

[OFFICIAL SEAL.] GEO. B. POURNELLE,
Deputy Clerk City Court, Richmond County, Ga.

[Endorsed:] Filed in office July 11, 1912. Geo. P. Pournelle, Deputy Clerk.

[Endorsed:] Case No. 4335. Court of Appeals of Georgia, October Term, 1912. Bill of Exceptions—Filed in Office Jul- 20, 1912. Logan Bleckley, C. C. A., Ga.

46 Court of Appeals of Georgia.

Case No. 4335.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY
v.
LIZZIE THOMPSON.

RUSSELL, *J.:*

1. As a general rule, a stipulation in a free pass, to the effect that the person who accepts such transportation himself assumes all risks of injury, is enforceable; and as to a passenger who has accepted free transportation a carrier is liable only for injuries resulting from wantonness or wilful negligence; but an exception to this rule is presented in the provision of the Hepburn act which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad

company which employs them the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employee, and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was traveling on a free pass, she would not be entitled to recover.

47 2. Under the facts in this case, it was not harmful error for the court to refuse to charge that testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal; and unless there is other evidence tending to establish his right to recover, he is not entitled to a finding in his favor, if that version of his testimony most unfavorable to himself shows that the verdict should be against him. The applicability of this rule of evidence in any particular case is addressed to the sound discretion of the court, who must determine, in the first instance, as to whether the testimony is self-contradictory, vague or equivocal. As the trial judge sees and hears the witnesses, it must be very manifest that he erred in the application of the rule, before the exercise of his discretion will be interfered with.

3. The court did not err in refusing a new trial upon the ground of the motion which was based upon newly discovered evidence that the plaintiff was not legally married to the employee of the railroad company, on account of whom the free transportation was issued. The alleged newly discovered testimony at most only furnishes proof of a presumptive marriage; and this must yield when brought into competition with proof of an actual marriage. Upon this point the decision is controlled by the ruling of the Supreme Court in

48 Norman v. Goode, 113 Ga. 121. "With no competing actual marriage proved, the law presumes marriage from cohabitation and repute; but this presumption the law declines to raise in opposition to a competing marriage actually proved." Jenkin v. Jenkins, 83 Ga. 287.

4. The evidence authorized the verdict, and there was no error in refusing a new trial.

Judgment affirmed.

49 Court of Appeals of the State of Georgia.

AUGUST 30, 1913.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

CHARLESTON & WESTERN CAROLINA RY. CO.
v.
LIZZIE THOMPSON.

This case came before this court upon a writ of error from the city court of Richmond county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

50 STATE OF GEORGIA:

In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,

vs.

LIZZIE THOMPSON, Defendant in Error.

The President of the United States to the Honorable Judges of the Court of Appeals of the State of Georgia, Greeting:

Because in the record — proceedings, as also in the rendition of judgment on the plea involving a Federal question, which is in the Court of Appeals of the State of Georgia, before you or some of you, being the highest Court of law or equity in said State, in which the decision complained of could be had, in the suit between Lizzie Thompson, plaintiff respondent, against the Charleston & Western Carolina Railway Company, defendant, plaintiff in error in said Court of Appeals, wherein was drawn in question, the right *to* said Railway Company to issue a gratuitious pass under the Act of Congress, known as the Hepburn Act, of June 29, 1906 in favor of the wife of an employee, providing for no liability for injuries received by her while so travelling on the trains of said Company, and the decision of the said Court of Appeals of the State of Georgia being against said right of said Railway Company, as claimed under Act of Congress, and a denial of the same,—a manifest error has happened, to the damage of said Charleston & Western Carolina Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment therein be given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid,

51 with all things concerning same to the Supreme Court of the United States, together with this writ so that you have the same at Washington within thirty (30) days from the date hereof, to be then and there held, that the record and proceedings aforesaid may be inspected, and the Supreme Court may cause further to be done therein to correct the error, what of right and according to the laws and customs of the United States might be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 11th day of September In the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States of America, the One Hundred and Thirty Seventh.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

Allowed by:
BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of
the State of Georgia.

Service acknowledged of a copy of the foregoing writ of error this 16" day of September, 1913.

WM. H. FLEMING,
Att'y for Lizzie Thompson.

Filed in office Sept. 18, 1913—Logan Bleckley, Clerk, Court of Appeals of Georgia.

52 STATE OF GEORGIA:

In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
vs.
LIZZIE THOMPSON, Defendant in Error.

The President of the United States to Lizzie Thompson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Appeals of Georgia, wherein the Charleston & Western Carolina Railway Company, defendant, is appellant, and you are plaintiff, respondent, to show cause, if any there be, why the judgment rendered against the said Charleston & Western Carolina Railway Company, defendant, Appellant, as in said writ mentioned, should not be corrected and why speedy justice should not be done *by* the parties in that behalf.

Witness, the Honorable Benjamin Harvey Hill, Chief Judge of the Court of Appeals of the State of Georgia, this 11th day of September In the Year of Our Lord One Thousand Nine Hundred and Thirteen.

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of the State of Georgia.

Service acknowledged of a copy of this citation this 16th day of September, 1913.

WM. H. FLEMING,
Att'y for Lizzie Thompson.

Filed in office Sept. 18, 1913—Logan Bleckley, Clerk Court of Appeals of Georgia.

53 STATE OF GEORGIA:

In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
v.
LIZZIE THOMPSON, Defendant in Error.

Petition for Writ of Error to the Supreme Court of the United States.

The Charleston & Western Carolina Railway Company, conceiving itself aggrieved by the decision made and judgment entered by the Court of Appeals of the State of Georgia, in the case of Lizzie Thompson, plaintiff below, against the Charleston & Western Carolina Railway Company, defendant below, and the plaintiff in error here, said judgment having been rendered on the 30th day of August, 1913,—said judgment being final, and rendered by the Court of Appeals of the State of Georgia, which is the highest Court in the State of Georgia in which said case could be heard, and also the last Court in which a final hearing and determination could be had of said case in said State. That said case was an action for damages for personal injuries to Lizzie Thompson, claimed to have been received while riding as a passenger on the train of said Railway Company October 16, 1910, for which she brought suit
54 for Nineteen Hundred and Ninety-nine Dollars ($1999), in the City Court of Richmond County, Georgia, March 13th, 1911, to which said suit said Railway Company duly made answer, and among other things plead that—

"Plaintiff was gratuitously carried on its train, she riding on a free pass from McCormick, South Carolina, to Augusta, Georgia, which provided among other things 'that the person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same. I accept the above conditions'. And defendant pleads the same against the plaintiff and in bar against her suit and says that she was not a passenger for hire as alleged, and that defendant is not liable for injuries for which she sues. Said pass being issued to plaintiff as the wife of an employee, gratuitously under the Act of Congress known as the Hepburn Act of June, 1906, Sec. 1."

That said answer was, on motion of plaintiff's counsel duly stricken by the Court, to which defendant entered exceptions of record. The case proceeded,—when the defendant requested the Court to charge the jury as follows:

"Plaintiff alleges that she was a passenger and had paid her fare, while the defendant contends that she had not paid such
55 fare but was traveling on a free pass. If you find from the testimony that she was traveling on a free pass, and that such pass contained a provision that the person accepting this free

pass agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from the negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same,—then I charge you that she should not be entitled to recover for the injuries for which she sues."

The trial court refused to give this charge and the Railroad Company duly excepted, contending a gratuitous pass issued to her, as the wife of an employee, as authorized by Act of Congress,—the Interstate Commerce Law,—and the provisions thereof, as to non-liability for injury to her—were binding upon her.

The case resulted in a verdict against the Railroad Company for Thirteen Hundred Dollars ($1300), which thereupon, after judgment against it on said verdict, moved for a new trial, which being refused, it carried the case to the said Court of Appeals of the State of Georgia, where on the date aforesaid said Court of Appeals affirmed said judgment of said city court against said Railway Company,—holding the Federal question involved—against the Railroad Company. Said decision and judgment being as follows:

56 "As a general rule, a stipulation in a free pass, to the effect that the person who accepts such transportation himself assumes all risks of injury, is enforceable; and as to a passenger who has accepted free transportation a carrier is liable only for injuries resulting from wantonness or wilful negligence; but an exception to this rule is presented in the provision of the Hepburn Act, which permits a Railroad Company to issue free transportation to its employees and members of their families. As between such employee and the railroad company which employs them the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the service of the employees, and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was traveling on a free pass, she would not be entitled to recover."

accordingly final judgment was rendered in said court against said Railroad Company.

And the said Railway Company being dissatisfied with the said judgment rendered against it by the Court of Appeals, and the construction given the Act of Congress of the United States of America adopted in 1887, known as the Interstate Commerce

57 Law, and the amendments thereto—especially the Act approved June 29th, 1906, known as the Hepburn Act,—by the Court (Said Act having been passed under the authority of Article 1, Section 8, Paragraph 3 of the Constitution of the United States of America) the same being a construction contrary to that contended for by the said Railway Company, and putting a duty and obligation upon the Railway Company not required by law, and of which there was no evidence in said case, but which said Court

held grew out of its relationship between itself and its employees; and being desirous of reviewing the said decision in the Supreme Court of the United States, the said Railway Company claiming that the protection afforded it under the said law of the United States has been refused and decided against it, now presents its petition and assignment of errors, and prays that a writ of error issue out of the Supreme Court of the United States to the Court of Appeals of the State of Georgia, to the end that the transcript of the record proceedings and papers in said case may be removed to the Supreme Court of the United States, that the errors complained of may be examined and corrected and the final judgment and decision of the Court of Appeals of the State of Georgia may be reviewed, reversed and set aside, and that the amount of security which the said Charleston & Western Carolina Railway Company shall give and furnish upon said writ of error be fixed by the Supreme Court
58 of the United States, upon the giving of which all further proceedings shall be suspended and stayed until the determination of said writ of error.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY,
By W. K. MILLER,
Its Attorney at Law of Record.

Filed in office Sept. 18, 1913, Logan Bleckley, Clerk, Court of Appeals of Georgia.

59 STATE OF GEORGIA:

In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
v.
LIZZIE THOMPSON, Defendant in Error.

Assignments of Error.

The Charleston & Western Carolina Railway Company, plaintiff in error in the above entitled case, complains of the judgment rendered against it by the Court of Appeals of the State of Georgia, in the above case, and for error therein assigns the following:

First. The Court of Appeals of the State of Georgia, committed error in holding and deciding as follows:

"But an exception to this rule is presented in the provision of the Hepburn Act which permits a Railroad Company to issue free transportation to its employees and members of their families. As between such employee and the Railroad Company which employs them the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employees, and may be treated as an element of value

within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was traveling on a free pass, she would not be entitled to recover."

The error being, in so construing and applying the Act of Congress regulating Interstate Commerce, known as the Hepburn Act of June 29th, 1906, and the said Court of Appeals, in and by its said decision deprived the plaintiff in error, said Railway Company, of the right guaranteed to it under and by the terms of the Act of Congress adopted in the year of 1887, known as the Interstate Commerce Act, and the Act amending the same approved June 29th, 1906, known as the Hepburn Act, and especially Section One, which permits and allows said Railway Company, an Interstate Carrier, to voluntarily, —and not by contract or compulsion,—issue free transportation to certain designated classes of person-, to wit: to its employees and their families, to ministers of religion, to Secretaries of Young Men'-Christian Associations, to inmates of Hospitals, etc. all of whom stand on the same footing and terms under the said Act; many of whom have no contractional relation whatever with the said carrier so issuing the pass; and the court erred in construing the said Act, wherein it held that when the carrier issued a pass to the wife of an employee, that it was not a free gratuitous pass, and erred in holding that it issued the same as a part of the consideration due the employee on account of his employment; and that such pass was not a free pass within the meaning of said law. The said Railway Company contends that the learned court improperly construed and applied the said Act, and by its decision denied plaintiff in error, said Railway Company, of a right guaranteed it under and by the said Act of Congress, which said Act it is respectfully submitted should have been construed as contended by said Railway Company, as allowing and permitting said Railway Company, as Interstate Carrier, to voluntarily issue to employees, and to members of their families, and others as designated in said Act, a free pass, as a mere gratuity, and not as a right or duty or obligation growing out of the fact of employment in Railway service of the husband and father. It appearing from the record in this case that said Lizzie Thompson, alleged wife of said George Thompson, Railway employee, was not employed by said Railway when injured thereon, but was traveling from McCormick, South Carolina, to Augusta, Georgia, for her own pleasure, and for no service connected with said Railway Company; and that there was no evidence of record that by or under the terms of employment between George Thompson and the said Railway Company it was ever agreed or understood that he or his family were to have, as part of the contract of his employment, transportation, on the Railway lines of said Railway Company, or that such transportation would be accorded to him and the members of his family as part of such employment.

Second. Because the Court of Appeals by its final judgment afore-

said committed error in overruling the exceptions of plaintiff in error and in affirming the judgment of the trial court in striking the plea of appellant, said Railway Company, which said plea was as follows:

"Plaintiff was gratuitously carried on its trains, she riding on a free pass from McCormick, South Carolina, to Augusta, Georgia, which provided among other things 'that the person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same. I accept the above conditions.' And defendant pleads the same against the plaintiff and in bar against her suit, and says that she was not a passenger for hire as alleged, and that defendant is not liable for the injuries for which she sues. Said pass being issued to plaintiff as the wife of an employee, gratuitously under the Act of Congress known as the Hepburn Act of June 1906, Sec. 1."

The error being, that it deprived said Railway Company, plaintiff in error, of a right guaranteed it under the Act of Congress,
63 of voluntarily issuing or not, in its discretion, free transportation to families of its employees on terms specified by it, and denied plaintiff in error the right to make a contract exempting itself from liability for injuries received by members of the families of employees while using such free transportation.

Third. Because the Court of Appeals in and by its final judgment aforesaid committed error in overruling the exceptions of plaintiff in error and in affirming the judgment of the trial court in refusing the charge requested by the said Railway Company, to wit:—

"Plaintiff alleges that she was a passenger and had paid her fare, while the defendant contends that she had not paid such fare but was travelling on a free pass. If you find from the testimony that she was travelling on a free pass, and that such pass contained a provision that the person accepting this free pass agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from the negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same,—then I charge you that she would not be entitled to recover for the injuries for which she sues."

The error being, that it deprived plaintiff in error of a right to which it was entitled under the Act of Congress, to wit, of
64 voluntarily issuing or not, in its discretion, free passes to families of employees, with a stipulation therein of non-liability for injuries received by them, or either of them, when travelling on such free transportation.

F. B. GRIER,
W. K. MILLER,
Attorneys for Plaintiff in Error.

Filed in office Sept. 18, 1913. Logan Bleckley, Clerk, Court of Appeals of Georgia.

65 In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
v.
LIZZIE THOMPSON, Defendant in Error.

The Charleston & Western Carolina Railway Company, by its attorneys, having presented to the court its petition praying for an allowance of a writ of error to the Supreme Court of the United States from the Court of Appeals of Georgia accompanied by sundry assignments of errors and praying that a transcript of the record and pleading and the papers upon which judgment therein rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further procedings may be had as may be proper in the premises.

Upon consideration hereof this court, being the court rendering the final judgment complained of, and the undersigned being the Chief Judge thereof does hereby allow the said writ of error, and assignments of error, the plaintiff giving and filing a bond in the sum of Twenty-three Hundred Dollars, ($2,300), which is hereby approved, which shall operate as a supersedeas, and the writ of error shall also operate as supersedeas, until final decision by the Supreme Court of the United States.

66 In witness whereof this order allowing said writ of error is signed by Benjamin H. Hill, Chief Judge of the said Court of Appeals of the State of Georgia, this 11th day of September, 1913, in the city of Atlanta.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of the State of Georgia.

Filed in the office this 18 day of September, 1913.
LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

67 STATE OF GEORGIA:

In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, Plaintiff in Error,
v.
LIZZIE THOMPSON, Defendant in Error.

Service acknowledged of a copy of the foregoing petition of writ of error and assignments of error in the above stated case.
This 16th day of September 1913.

WM. H. FLEMING,
Att'y for Lizzie Thompson.

Filed in office Sept. 18, 1913.

LOGAN BLECKLEY,
Clerk Court of Appeals of Georgia.

68 Know all men by these presents, That we, the Charleston & Western Carolina Railway Company, as principal, and Ernest Williams, as surety, are held and firmly bound unto Lizzie Thompson in the full and just sum of Twenty-six Hundred Dollars, to be paid to the said Lizzie Thompson, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of September, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the Court of Appeals of said State, in a suit depending in said Court between the said Lizzie Thompson and the Charleston & Western Carolina Railway Company, a judgment was rendered against the said Railway, and the said Railway having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Lizzie Thompson citing
69 and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Charleston & Western Carolina Railway Co. shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLESTON & WESTERN CAROLINA RY CO.,
By A. W. ANDERSON,
Gen'l Manager. [SEAL.]

Surety:
ERNEST WILLIAMS. [L. S.]

Sealed and delivered in presence of:
RODNEY S. COHEN,
Notary Public, Richmond County, Ga.

[OFFICIAL SEAL.]

Approved by:
BENJAMIN H. HILL,
Chief Judge, Court of Appeals of Georgia.

Service acknowledged of the within bond, this Sept. 11, 1913.
WM. H. FLEMING,
Att'y for Lizzie Thompson.

Filed in office, September 18, 1913. Logan Bleckley, Clerk Court of Appeals of Georgia.

70 In the Court of Appeals of the State of Georgia.

CHARLESTON & WESTERN RAILWAY COMPANY, Plaintiff in Error,
v.
LIZZIE THOMPSON, Defendant in Error.

Agreement Between the Parties as to the Record to Accompany the Writ of Error to the Supreme Court of the United States in the Above-stated Case.

It is agreed between the parties hereto that the following constitute the record to accompany the writ of error in the above stated case, to wit:

(1) The original petition of plaintiff in the City Court of Richmon County.
(2) Amendments thereto.
(3) Answer of defendant.
(4) Amended answer.
(5) Interlocutory exceptions of defendant to striking amended answer.
(6) Verdict and judgment.
(7) Original motion for new trial.
(8) Amended motion for new trial of April 25, 1912.
(9) Evidence of plaintiff Lizzie Thompson record 44 and 76.
(10) Evidence of George Thompson record page 82, 83.
71 (11) Witness for the defendant —evidence of Davenport. Record p. 57-81.
(12) Evidence of J. Hernlon, Conductor, record 61,—also on page 81.
(13) Evidence of W. L. Humphrey, record 72.
(14) Evidence of Fannie May, record 84.
(15) Evidence of A. H. Porter, record 85.
(16) Copy of the pass, page 87.
(17) Defendants, Railway Company's bill of exceptions from City Court, Richmond County, to Court of Appeals.
(18) Decision of the Court of Appeals on this bill of exceptions.
(19) Order of judgment of Court of Appeals affirming judgment of City Court, Richmond County.
(20) Order granting writ of error and supersedeas.
(21) Petition for writ of error,—Assignments of error,—Bond,—Writ of error,—citation and service.

Sept. 16, 1913.

W. K. MILLER,
Attorney Charleston & Western Carolina Ry. Co.
W. H. FLEMING,
Attorney for Lizzie Thompson.

Filed in office, Sept. 18, 1913. Logan Bleckley, Clerk. Court of Appeals of Georgia.

72 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *October* 7, 1913.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of Charleston & Western Carolina Railway Company v. Lizzie Thompson which are required by the agreement of counsel to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

73 Court of Appeals of Georgia.

Case No. 4335.

CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY
v.
THOMPSON.

By the COURT:

1. As a general rule, a stipulation in a free pass given by a carrier, to the effect that the person who accepts it assumes all risks of injury in transportation, is enforceable; and as a passenger who has accepted transportation under such a pass a carrier is liable only for injuries resulting from wantonness or wilful negligence; but an exception to this rule is presented in the provision of the "Hepburn act" (Act of June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1911, p. 1288]) which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be regarded as a part of the consideration paid for the services of the employee, and may be treated as an element of
74 value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that if the plaintiff (the wife of an employee) was traveling on a free pass, she would not be entitled to recover.

2. Under the facts of this case, it was not harmful error for the court to refuse to charge that testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal; and that unless there is other evidence tending to establish his right to recover, he is not entitled to a finding in his favor, if that version of his tes-

timony most unfavorable to himself shows that the verdict should be against him. The applicability of this rule of evidence in any particular case is addressed to the sound discretion of the trial judge, who must determine, in the first instance, as to whether the testimony is self-contradictory, vague, or equivocal. As the trial judge sees and hears the witnesses, error in his application of the rule must be very manifest before the exercise of his discretion will be interfered with.

3. The court did not err in refusing a new trial upon the ground of the motion therefor based upon newly discovered evidence that the plaintiff was not legally married to the employee on account of whom the free pass was issued. The alleged newly discovered tes-
75 timony at most furnishes proof of only a presumptive marriage; and this must yield when brought into competition with proof of an actual marriage. Upon this point the decision is controlled by the ruling of the Supreme Court in Norman v. Goode, 113 Ga. 121 (38 S. E. 317). "With no competing actual marriage proved, the law presumes marriage from cohabitation and repute; but this presumption the law declines to raise in opposition to a competing marriage actually proved." Jenkins v. Jenkins, 83 Ga. 287 (9 S. E. 542, 20 Am. St. R. 316).

4. The evidence authorized the verdict, and there was no error in refusing a new trial.

The plaintiff, Lizzie Thompson, alleged and testified, that she was a passenger on a train of the defendant railway company October 16, 1910, traveling from McCormick, South Carolina, to Augusta, Georgia; that she paid full fare for her transportation; and that through the negligence of the company a collision occurred, in which she was injured internally. On the trial the defendant's conductor testified that the plaintiff and two children were traveling on a free pass from McCormick, South Carolina, to Augusta, Georgia, and that she signed her name by cross-mark on the back thereof. The plaintiff amended her petition by denying this, and the defendant amended its answer, pleading that the plaintiff at the time
76 of injury was traveling on a free pass from McCormick, South Carolina, to Augusta, Georgia, issued to her as the dependent wife of a railroad laborer, pursuant to the interstate-commerce law, known as the "Hepburn act." This pass was as follows:

"Charleston & Western Carolina Railway Company.

Trip Pass.

Pass Lizzie Thompson and two children, Rose and George, from McCormick, S. C., to Augusta, Ga., on account of wife and dep't children Rdw. Lbr. Good for one trip only until Nov. 15, 1910, when countersigned by W. L. Humphrey.

Date Oct. 15, 1910.

No. 12923.

A. W. ANDERSON,
General Superintendent.

[In the Margin.]

Countersignature:
W. L. HUMPHREY.

Not Transferable.

[On the Back.]

This free ticket is not transferable, and if presented by another person than the individual named thereon, or if any alteration, addition, or erasure is made upon it, it is forfeited, and the conductor will take it up and collect full fare. The person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable, under any circumstances, whether of
77 negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same.

I accept the above conditions.

X.

(Sign in ink or indelible pencil.)

Conductor will not recognize this pass until properly signed."

It was testified that this pass was taken up and punched by the conductor, but the pass was part of a round-trip ticket, issued at Augusta, of which the other half was not produced, and the conductor's written report failed to show any passenger riding on a free pass from McCormick, South Carolina, to Augusta, Georgia.

The defendant excepted pendente lite to the court's refusal to allow an amendment to the answer, by which it was sought to set up an express contract relieving the defendant from liability for negligence; but the rejected amendment is not embodied in the bill of exceptions, nor does the brief of counsel for the plaintiff in error specifically refer to the refusal to allow the amendment.

RUSSELL, *J.* (after stating the foregoing facts):

Lizzie Thompson brought suit against the Charleston and Western Carolina Railway Company for damages alleged to be consequent upon injuries received by her as a passenger. She alleged
78 that she purchased a ticket and paid full fare for her transportation. To dispute this the defendant introduced a free pass, and the conductor testified that he received only this pass for the transportation of the plaintiff and her two children. For the reason that the evidence as to the nature of the plaintiff's injuries is in conflict, it is unnecessary to consider the testimony as to the extent of her injuries, or the showing by the defendant company to the effect that her condition was due to causes which anteceded the alleged injury.

The three assignments of error in the grounds of the motion for a new trial as first amended raise two questions. One is as to the right of the plaintiff to recover if the jury believed she was traveling upon

a free pass, and the other relates to the refusal of the court to instruct the jury that where the testimony of a party who offers herself as a witness in her own behalf is self-contradictory, vague, or equivocal, the jury should adopt that construction of it which is most unfavorable to her contention. The first exception naturally subdivides itself into two questions: (1) Can a person injured while riding upon a free pass recover for injuries other than those due to gross neglect on the part of the carrier? (2) Can a member of the family of a railway employee who uses a pass for transportation, and who, under the provisions of the "Hepburn act" (Act of June 29, 1906, c. 3591, 34 Stat. 584), is entitled to free transportation, be held, as a matter of law, to be using a free pass?

79 As to the first question there is a wide diversity of opinion among the authorities. In many jurisdictions it is held that any stipulation by which a common carrier seeks to avoid liability for negligence which may cause injury to a passenger is contrary to public policy. However, other courts of equal eminence hold that it is simply a matter of contract; that the carrier, as related to one transported free of charge, is not a common carrier, but that the person so transported is merely a guest, and that public policy will not prevent the person to be carried and the transportation company from agreeing that the passenger shall assume the risks of travel. Among those States in which it has been held, upon grounds of public policy, that the right to exemption from all liability can not be extended to a carrier of passengers are Alabama, Arkansas, Indiana, Iowa, Minnesota, Mississippi, Missouri, Pennsylvania, Texas, Vermont, and Virginia. The doctrine announced by these courts may well be summarized by the ruling of the Supreme Court of Indiana in Louisville, &c. Ry. Co. v. Faylor, 126 Ind. 126 (25 N. E. 869), in which, discussing the case of a free pass containing a waiver of liability for negligent injuries, the court says: "Common carriers are subject to the same liability for injuries resulting from negligence to persons riding on a free pass as they are to those who pay full fare." See also: Norfolk & Western R. Co. v. Tanner, 100 Va. 379 (41 S. E. 721); Huckstep v. St. Louis &c. R. Co., 166 Mo. App. 330 (148 S. W. 988); St. Louis, Iron Mountain &

80 Southern R. Co. v. Pitcock, 82 Ark. 441 (101 S. W. 725, 118 Am. St. R. 284, 12 Ann. Cas. 582); Memphis &c. R. Co. v. Steel (Ark.), 156 S. W. 182. All of these decisions rest upon the ground that if public policy, out of regard for the safety of human life and person, declares a contract of waiver of liability void, it can make no difference whether the passenger who made the contract paid fare or was riding free; and to support this proposition it is said that the life of one kind of passenger is just as sacred, in the eyes of the law, as the other, and that the same negligence which would kill a free passenger might kill a full-paid passenger, and there is no reason why the carrier should be given free hand to slaughter one and not the other. In support of the proposition that one who is voluntarily accepting transportation as a gratuity is not, in a legal sense, a passenger, and that the railway company is not liable for injuries not caused by its gross neglect, or not wilfully and wantonly

inflicted, are rulings in Massachusetts, New York, Tennessee, Illinois, Maine, Connecticut, New Jersey, Washington, Wisconsin, Texas, and Indiana, as well as the Supreme Court of the United States. The question here directly involved does not seem to have been made in this State. But in Holly v. Southern Railway Co., 119 Ga. 767 (47 S. E. 188), the Supreme Court held that the plaintiff, who was riding upon a free pass, could not recover for the loss of her baggage; and it is so difficult to see how one riding on
81 a free pass could recover for an injury to her person, due to negligence of a carrier, when for injury to or loss of her property, due to such negligence, she can not recover, that it seems to us to be settled (upon the authority of the ruling in the Holly case) that a purely gratuitous passenger who accepts free transportation upon an agreement that he assumes all the risks of injury can not recover damages for an injury occasioned by the failure of the carrier to exercise extraordinary diligence. In the Holly case the Supreme Court held that "One who receives of a railroad company a gratuitous pass over its line, which by its terms is 'issued only on condition that the person accepting it assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, for any injury to the person, or loss or damage to the property of the person using it,' can not recover of the company the value of baggage lost while traveling on such pass." In the decision in the Holly case, too, the Supreme Court expressly distinguished that case from Central Ry. Co. v. Lippman, 110 Ga. 665 (36 S. E. 202, 50 L. R. A. 673), by saying that in the Lippman case "the relation of carrier and passenger existed between the defendant and the plaintiff in its full sense, while here there was no consideration whatever for the carriage." And quoting from Muldoon v. Seattle City Ry. Co., 7 Wash. 528 (35 Pac. 422, 22 L. R. A. 794, 38 Am. St. R. 901), the court says: "When the intending passenger
82 proposes to the carrier that it do something for him which it is not, under any conceivable circumstance, required by law or duty to do, viz., to carry him, without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why the public should step in and deny the right of the carrier to limit its chances of loss in the operation." As the Muldoon case, from which the Supreme Court approvingly quoted the above excerpt, was one of personal injuries, it would seem to be unquestionable that the same principle controls, whether the case be one of injury to person or one of injury to property.

Under the evidence in this case it was questionable whether the plaintiff was carried in consideration of the payment of her fare or upon a free pass. It was also questionable, even if she was carried upon a free pass, whether she had knowledge of the stipulation attached to her ticket, and assented to the condition relieving the railway company from liability. But in Boering v. Chesapeake Beach Railway Co., 193 U. S. 442 (24 Sup. Ct. 515, 48 L. ed. 742), the Supreme Court of the United States held that a stipulation in a free railway pass requiring the user to assume risks of injury due

to the carrier's negligence is binding on the person accepting the privilege, although notice of such stipulation may not have been brought home to her. And on the subject of notice the court
83 said in that case: "She may not, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted." The court quotes from Quimby v. Boston & Maine Railroad Co., 150 Mass. 365 (23 N. E. 205, 5 L. R. A. 846) the statement that "Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not." In Marshall v. Nashville Ry. &c. Co., 118 Tenn. 254 (101 S. W. 419, 9 L. R. A. (N. S.) 1246, 12 Ann. Cas. 675), the Supreme Court of Tennessee reviews the various cases and holds that carriers will not be permitted to protect themselves against the consequences of their own negligence in the carriage of goods or passengers while they are common carriers, but they may become the carriers of goods gratuitously, and the law will then hold them liable only as mandatories; that is, only for losses occurring through gross negligence. As mandatories they are liable only for gross negligence; when compensated for the carriage they are common carriers, regardless of contract. This same doctrine, and the distinction growing out of the presence or absence of compensation, are forcibly stated in the decisions in Northern Pacific Railway Co. v. Adams, 192 U. S. 440 (24 Sup. Ct. 408, 48 L. ed. 513), and in Boering v. Chesapeake Beach Ry. Co., supra, which cite a large number of authorities and treat the subject very elaborately. See also, upon the right of a railway company to carry passengers gratuitously, and the consequent degree of liability attaching in such a case, Duncan v. Maine
84 Central R. Co., 113 Fed. 508; Muldoon v. Seattle City Ry. Co., supra; Payne v. Terre Haute &c. Ry. Co., 157 Ind. 616 (62 N. E. 472, 56 L. R. A. 472); Griswold v. New York &c. R. Co., 53 Conn. 371 (4 Atl. 261, 55 Am. R. 115); Toledo Ry. v. Beggs, 85 Ill. 80 (28 Am. R. 613); Quimby v. Boston & Maine R. Co., supra; Kinney v. Central Ry., 34 N. J. L. 513 (3 Am. R. 265); Willis v. N. Y. Central Railroad, 24 N. Y. 181; Perkins v. N. Y. Central Railroad, 24 N. Y. 196 (82 Am. D. 282); Marshall v. Nashville Ry. &c. Co., supra; Gulf Railway Co. v. McGowan, 65 Tex. 640; Annas v. Milwaukee &c. R. Co., 67 Wis. 46 (30 N. W. 282, 58 Am. R. 848); Rogers v. Kennebec S. Co., 86 Maine, 261 (29 Atl. 1069, 25 L. R. A. 491); Smith v. Atchison &c. R. Co., 194 Fed. 79 (114 C. C. A. 157).

As to the point that the passenger need not sign the contract of exemption, the cases of Wells v. New York Central Railroad, Boering v. Chesapeake Beach Ry. Co., Muldoon v. Seattle City Ry. Co., and Quimby v. Boston & Maine Railroad Co., supra, are in point. The Civil Code provides that a carrier may by express contract relieve itself from liability: "A common carrier can not limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." §2726. In the Lippman case, supra, Justice Little points out that the term "common

carrier" applies only to carriers of freight, and that the term
85 "carrier of passengers" should be applied to those who are engaged in that occupation. In the present case the distinction is perhaps immaterial, because it is not generally borne in mind by those courts which have dealt with the question now before us. In view of the ruling in the Holly case, supra, as well as the persuasive force of later rulings of the Supreme Court upon the kindred question, we think the rule should be that one who is riding without the payment of any compensation therefor is not entitled to recover damages for injuries where they are due to negligence less than gross negligence and when there is no admixture of wilfulness or wantonness.

However, we bear in mind that in the present case there is evidence which authorized the jury to find that if the plaintiff was in fact riding upon a free pass, it had been given to her in accordance with the provisions of the Hepburn act, supra, as the wife of an employee of the defendant company. And in this aspect of the evidence it becomes necessary to enquire whether a member of a railway employee's family, though given nominally free transportation, would be entitled to recover for injuries inflicted upon her by the negligence of the company.

We are of the opinion that the question is answered unequivocally in the affirmative by the express provisions of the Carmack amendment to the Hepburn act (34 Stat. 584-5), in which special
86 provision is made for interstate free tickets, free passes, or free transportation for employees of common carriers and their families. The portion of the act to which we refer is as follows: "No common carrier, subject to the provisions of this act, shall after January 1, 1907, directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, attorneys at law," etc. (thereafter expressly designating other exceptions).

As was said by Mr. Justice Harlan in Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 467, 478-9 (31 Sup. Ct. 265, 55 L. ed. 297), in dealing with an attempt on the part of the defendants in error to enforce a contract guaranteeing them free passes during their lives, in consideration of the settlement of a claim for personal injuries, "Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect to the prohibition of free tickets, free passes and free transportation." It must be inferred, from a careful reading of that decision, that since the contract in that case, no matter how just, could not be enforced, because Congress, after due deliberation, had not excepted existing contracts, the same legislative power has by means of a special exception, placed the right of employees and their families to accept free transportation in interstate carriage upon such grounds as not to sub-
87 ject it to attack as being contrary to public policy. We think it follows, too, that Congress, in considering the question of exceptions to the rule that all charges for transportation must

be paid in money, as stated in that case, took also into consideration the fact that transportation might be given by the carrier, and accepted by employees, as partial payment for services rendered; and perhaps this was one reason why the exception was made. It is a matter of common knowledge that in many instances (as, at unimportant stations, where the services of physicians, surgeons, and attorneys at law are only infrequently required) the compensation of those employed consists principally, if not entirely, in free transportation for themselves and their families. Since Congress had under consideration the matter of exceptions, and had unlimited power to make any exception or to refuse to make it, and saw fit to except employees and their families, we think it is to be presumed that Congress had in mind the fact that free transportation for the employee and his dependent family would be such an item of value as would afford partial consideration for his services, and perhaps reduce the amount for which he would be willing to labor for the carrier. Certainly, under the ruling in Louisville & Nashville R. Co. v. Mottley, supra, there can be no question that Congress had the right to make the exception; and the language in which the
88 exception is conferred is too plain to be misunderstood.

It may be admitted that the provisions of the act of Congress, supra, do not require interstate carriers to issue free transportation to their employees, nor place upon any carrier the duty of granting free transportation, either to employees or to any of other class which Congress has made a matter of special exception, by permitting these carriers to grant free transportation to such persons only as are enumerated in the act. For reasons which Congress adjudged sufficient (as pointed out by Mr Justice Harlan), carriers engaged in interstate transportation were given permission to issue free passes to employees and dependent members of their families, and upon the use of this privilege it placed no limitation inconsistent with the theory that as between employer and employee the monetary value of such transportation (even if used as a mere matter of pleasure to the members of the employee's family) might be taken into consideration as a part of the employee's compensation. The alleged free-pass contract was apparently made in the State of Georgia, and is to be construed by the law of this State. 6 Cyc. 580, and citations. And while we think that generally a stipulation in a free pass to the effect that the person who accepts such transportation shall himself assume all risk of injury is enforceable, and as to a passenger who has accepted free transportation the carrier is liable only for injuries resulting from wantonness or wilful negligence, still an exception to this rule is presented in the pro-
89 vision of the Hepburn act which permits a railroad company to issue free transportation to its employees and members of their families; and as between such an employee and the railroad company which employs him, the privilege and benefit of being afforded transportation without cost may be regarded as a part of the consideration paid for the services of the employee, and as an element of value within the contemplation of both parties at the time the contract of employment was entered into; and therefore such a

free pass can not be treated as necessarily a mere gratuity. In the absence of evidence to the effect that the alleged free pass now involved was not within the contemplation of the parties, and in view of the well-known custom, which was recognized by Congress as obtaining between carriers and their employees, we can not hold that the jury was not authorized to infer (if indeed they believed the plaintiff was riding upon a pass) that the grant of this privilege entered into the consideration of the contract of employment, and that the services of the husband supplied at least some such consideration for the transportation as made plaintiff a passenger for hire.

As pointed out in several of the decisions to which we have referred, and also in some of the rulings of the Supreme Court of the United States which we have investigated, the extension of the privilege of sometimes riding upon the trains of the railway company by which they are employed is an item of value to the
90 employer which is in a measure compensatory for the transportation offered. As heretofore stated, it enables these companies, perhaps, to obtain the services of their employees at a lower price than would otherwise be the case, and it may be presumed that it is mutually understood and agreed between employer and employee that a deduction be made on this account from the probable amount which would otherwise be paid for services. In a case in which this was shown to be true, it could not be said that the privilege of transportation, though nominally free, was gratuitous. And where the proof shows that it was expressly understood that free transportation should be furnished, or where it appears that the custom of furnishing its employees transportation on the part of the company is so uniform and universal as to reasonably raise the inference that it will be extended to employees and their families generally, the fact that free transportation was furnished by the railway company should not preclude the right of recovery in case of injury being inflicted by the negligence of a railway company. Taking this latter principle into consideration, it can not be held that the trial judge erred in refusing to charge the jury as follows: "Plaintiff alleges that she was a passenger and had paid her fare, while the defendant contends that she had not paid such fare, but was traveling on free pass. If you find, from the testimony, that she was
91 traveling on a free pass, and that such pass contained a provision that the person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from the negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same, then I charge you that she would not be entitled to recover for the injuries for which she sues." The charge requested was adjusted to the case of one riding upon a free pass without regard to her relationship to an employee of the railway company. It would have been a proper instruction if it had been qualified by the additional statement that if the jury found the plaintiff was not the wife of George Thompson, and was traveling on a free pass containing the stipulations mentioned, then she would not be entitled to recover. It was issuable

whether she was George Thompson's wife, and the court correctly instructed the jury upon this point; but as the court could not undertake to determine the issue as to the marriage of George Thompson and Lizzie Thompson, the requested instruction which we have quoted above should have been so qualified as to have been applicable to the case in the event the jury should have found that these parties were legally married. The court did not err in refusing to charge the jury that "a stipulation in a free railway pass, requiring the user to assume all risk of injury due to the carrier's negligence, is binding on the person accepting the privilege, although notice of such stipulation may not have been brought home to
92 him."

2. The court refused a request to charge the jury that "the testimony of a party who offers herself as a witness in her own behalf is to be considered most strongly against her, when it is self-contradictory, vague, or equivocal; and unless there be other evidence tending to establish her right to recover, she is not entitled to a finding in her favor, if that version of the testimony most unfavorable to her shows that the verdict should be against her." This should have been given in charge to the jury. One of the vital points in the case was whether the plaintiff was the wife of George Thompson. Unless she was his wife she could not, under the provisions of the Hepburn act, supra, have legally used the free pass. Unless she was his wife she would not have been entitled, as the user of a free pass, to recover for any injuries except those inflicted by gross negligence, or wilful and wanton negligence; and her testimony as to this point, as embodied in the record, may be construed to be self-contradictory, vague, and equivocal. Personally the writer, if he had been in the place of the trial judge, would have been strongly inclined to charge the jury as requested by counsel. But since a trial judge can never give instructions which tend to affect the weight of any testimony which has been introduced except at the peril of using language which may violate the provisions of section 4863 of the Civil Code, we can not hold that the trial judge in the present instance erred in leaving the jury free to de-
93 termine for themselves, in the first place, whether the testimony of any witness was contradictory, vague, or equivocal, and in the next place how they would consider such testimony, and what weight they would attach thereto. The applicability of the rule of evidence which the defendant sought to have presented to the jury is a matter necessarily addressed to the sound legal discretion of the trial court in any case where reference to the rule would seem to be proper, and the exercise of this discretion by the trial judge should not be controlled except when there has been a manifest abuse of discretion. Evil is more apt to result from exercising the discretion by giving instructions which may tend to depreciate certain testimony, than by withholding such instructions in the exercise of the same discretion.

3. In a second amendment to its motion for a new trial, the defendant presented testimony to show that the plaintiff's marriage to her alleged husband was void because she was a party to a pre-

vious marriage contract undissolved. It appears that the information of the defendant as to this point was not acquired until during the trial of the companion case of her alleged husband, George Thompson, against the defendant, which occurred after the trial of this case; so that there does not appear to have been any lack of ordinary diligence. Testimony that the plaintiff was not the wife of George Thompson was of such importance as likely to produce a
94 different result upon another investigation, if such testimony was credible to the jury; and yet we can not say that the trial judge, in overruling this ground of the motion for a new trial, was not amply supported by the rulings of the Supreme Court in Jenkins v. Jenkins, 83 Ga. 283 (9 S. E. 541, 20 Am. St. R. 316), Norman v. Goode, 113 Ga. 121 (38 S. E. 217), Sellers v. Page, 127 Ga. 633 (56 S. E. 1011), and Drawdy v. Hesters 130 Ga. 161 (60 S. E. 451, 15 L. R. A. (N. S.) 190). As ruled by Chief Justice Bleckley in Jenkins v. Jenkins, supra, the issue presented by this ground of the amended motion for a new trial was one of fact for determination by the judge, and "The true doctrine of the authorities is, that where two alleged marriages compete, and one of them is proved as a fact, whether by direct or circumstantial evidence, the other can not be left to stand upon the mere legal presumption founded on cohabitation and repute. * * * With no competing actual marriage proved, the law presumes marriage from cohabitation and repute. But this presumption the law declines to raise in opposition to a competing marriage actually proved." The testimony for the movant established a presumption of marriage, the testimony for the respondent established an actual marriage. Under the rulings above referred to, the court did not err in adjudging that the marriage proved by circumstantial evidence was inferior to the marriage established by direct proof.

4. The evidence authorized the verdict, and there was
95 no error in refusing a new trial.

Judgment affirmed.

96 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *February* 26, 1914.

I hereby certify that the foregoing pages hereto attached contain a true copy of the revised opinion of the Court of Appeals of Georgia in Case No. 4335, Charleston & Western Carolina Railway Co. v. Lizzie Thompson, which revised opinion was filed with the clerk on February 24, 1914. All of which appears from the records and files of this office. This opinion is now transmitted in order to comply with Rule 8 (2) of the Supreme Court of the United States.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed the day and year first above written.

[Seal Court of Appeals of the State of Georgia.]

LOGAN BLECKLEY, *Clerk.*

97 [Endorsed:] File No. 23902. Supreme Court U. S., October term, 1913. Term No. 751. Charleston & Western Carolina Ry. Co., pl'ff in error, vs. Lizzie Thompson. Certified copy of revised opinion of Court of Appeals of State of Georgia. Filed February 28, 1914. 751—23902.

Endorsed on cover: File No. 23,902. Georgia Court of Appeals. Term No. 751. Charleston & Western Carolina Railway Company, plaintiff in error, vs. Lizzie Thompson. Filed October 15th, 1913. File No. 23,902.

25

Supreme Court of the United States

OCTOBER TERM, 1913.

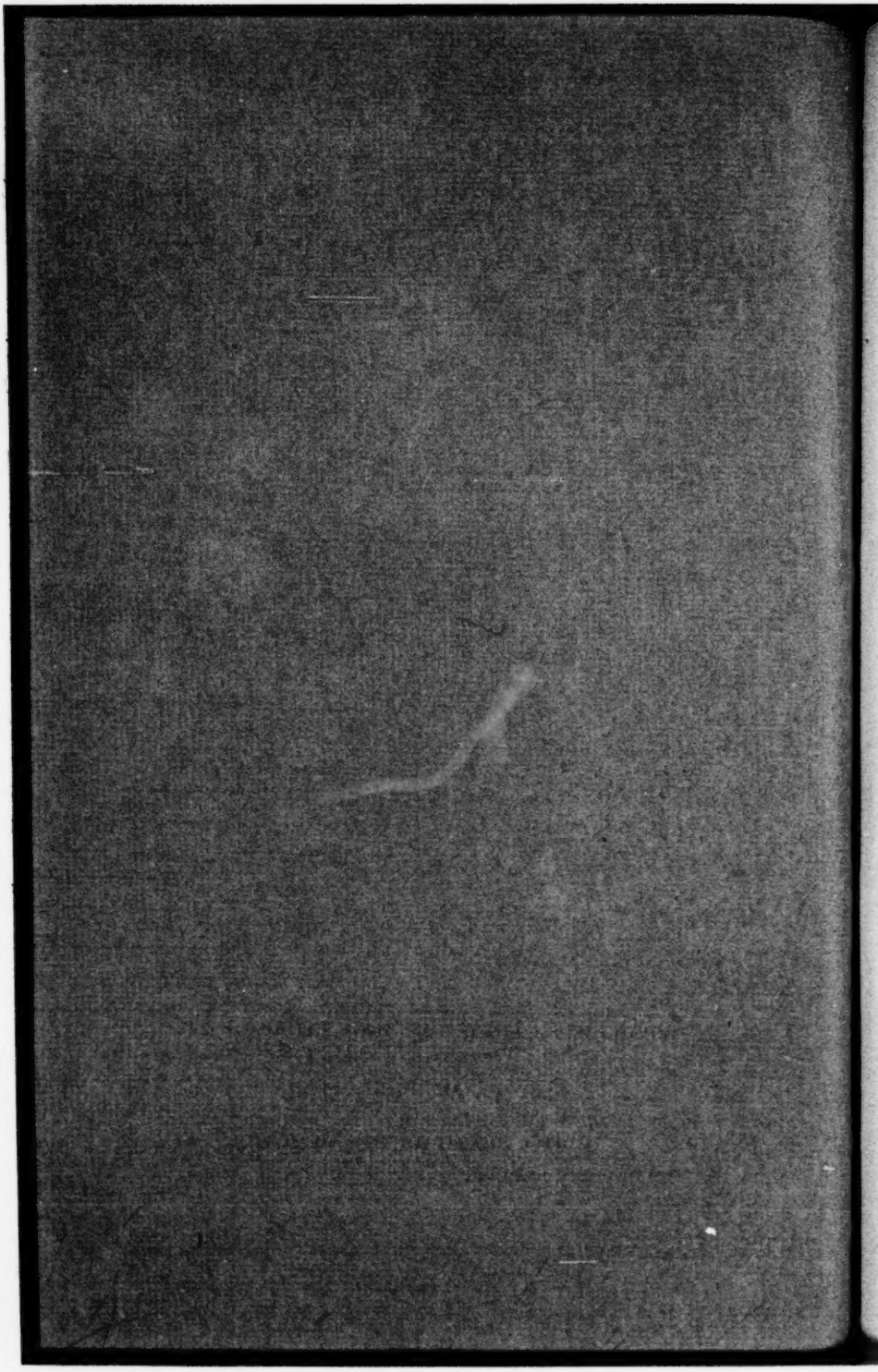
Charleston & Western Carolina Railway Company, Plaintiff in Error, vs. Lizzie Thompson, Defendant in Error.

No. 751
Writ of Error from Court of Appeals of the State of Georgia

MOTION TO DISMISS WRIT OF ERROR

AND

BRIEF ON THAT MOTION



Supreme Court of the United States

OCTOBER TERM, 1913.

Charleston & Western Carolina Railway Company, Plaintiff in Error, vs. Lizzie Thompson, Defendant in Error.	No. 751 Writ of Error from Court of Appeals of the State of Georgia

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MOTION TO DISMISS WRIT OF ERROR.

Now comes the defendant in error in the above stated case and moves to dismiss the writ therein, and for cause shows:

That the Supreme Court of the United States has no jurisdiction because no federal question is involved, as will be seen from the following facts appearing on the face of the record:

1. The suit was originally filed in the City Court of Richmond County, Georgia, by Lizzie Thompson against the Charleston & Western Carolina Railway Company, claiming damages for personal injuries, sustained by her in a head-on collision of trains at a point on defendant's road in the State of South Carolina, while she was riding as a passenger on a round trip ticket bought and paid for by her at the depot of the railway company in Augusta, Georgia.

The damages were claimed under the general state law—no mention being made of a federal statute.

2. The railway's original answer consisted solely of general denials of the petition. Subsequently it

set up a plea of exemptoin from liability, by claiming that plaintiff was riding on a free pass containing a waiver of right to damages.

At the close of the plea setting up the "free pass", occurs the following explanatory language:

"Said pass being issued to the plaintiff as the wife of an employe, gratuitously under the Act of Congress known as the Hepburn Act of June, 1906, Sec. 1."

This is the only mention of a federal statute in the pleadings.

3. The trial court struck this plea of a free pass—holding that under the state law, the railway was liable, regardless of whether plaintiff was riding on a bought ticket, as she contended, or a free pass, as the railroad contended.

The trial court also refused to give in charge to the jury a written request presented by counsel for the railway to the effect that if plaintiff was riding on a free pass with waiver of right to damages the railway was not liable; but this written request made no reference at all to the Hepburn Act, or to any other federal statute.

The Jury gave a verdict for $1,300.00 which was affirmed by the Court of Appeals.

4. The Court of Appeals in rendering its opinion affirming the judgment of the trial court used the following language:

"As a general rule a stipulation in a free pass to the effect that the person who accepts such transportation himself assumes all risks of injury is enforceable; and as to a passenger who has accepted free transportation, a carrier is liable only for injuries resulting only from wantonness or wilful negligence; but an exception to this rule is presented in the provision of the Hepburn Act which permits a railroad company to

issue free transportation to its employees, and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employees and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the Court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was travelling on a free pass, she would not be entitled to recover."

Except this reference to the Hepburn Act as a piece of evidence in determining whether or not an alleged "free pass" was really a gratuity, the Court of Appeals made no allusion to any federal statute.

For material parts of record see Appendix.

WM. H. FLEMING,
Atty. for Defendant in Error.

BRIEF.

1. The only authority for a writ of error in a case like the one at bar is that contained in a part of Section 237 of the Judicial Code of 1911, formerly Section 709 Revised Statutes, in the following words: "or where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised, under the United States and the decision is against the right, title, privilege or immunity specially set up or claimed by either party under such constitution treaty, statute, commission or authority may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

2. It is manifest that in the case at bar no right was claimed under the federal statute known at the Hepburn Act except the **right to issue a "free pass"**, so called, to the wife of an employee.

Neither the plaintiff nor the judge of either the trial court or the reviewing court ever questioned that right.

On the contrary, the right to issue the pass was admitted, and the fact that this federal statute excepted "employees and their families" from the inhibition of the anti-free pass rule was urged as weighty **evidence** that the so-called free pass issued to the wife of an employee on his request (as the railroad claimed in this case) did have a consideration behind it; that it was a factor in the compensation of the laborer's work, and was a strong inducement for an ordinary laborer (like the husband of plaintiff) to work for railroads at reasonable wages, and obey orders and submit to discipline and preserve a spirit of loyalty and avoid strikes, etc.

3. Such a "pass" issued to a laborer for use of his wife is not a free pass in the sense of being a **gratuity.**

This Court in Railroad Co. vs. Lockwood, 17 Wall. 355 (359), in deciding that a drover's "free pass" was not a gratuity, uses this language:

"It may be assumed **in limine** that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle."

Again in Railway Co. vs. Stevens, 95 U. S. 655 (658), this Court in the case of an owner of a patented car coupler travelling on a so-called free pass, from one point to another on the railroad to see one of its officers in regard to his patent, says:

"The transportation of the plaintiff in defendant's

cars though not paid for by him in money, was not a matter of charity nor of gratuity in any sense."

4. All that the Georgia Court of Appeals decided was that the so-called free pass on which the railroad claimed plaintiff was riding (though she swore to the last she was riding on a regular bought ticket) was not a pure gratuity so as to exempt the road under state law, but had a good and valuable consideration behind it through the labor services of her husband at whose request it was granted, as claimed by the railroad.

In deciding that point of state law, the Court of Appeals referred to the federal statute permitting the issuance of passes to laborers and their familites as an **evidential fact** sustaining its affirmance of the trial Court's decision on a question of state law.

The language of the Georgia Court of Appeals on that point is as follows:

"As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation, without cost may be considered as a part of the consideration paid for the services of the employees and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment."

5. The only legal purpose defendant could have had in mentioning the Hepburn anti-free pass act was to show that defendant had not committed a crime against that act by issuing the pass in question.

Had the pass been criminally issued, the road could have claimed no benefits thereunder, and its plea would have been a confession of guilt **in judicio.**

6. But again, that federal statute makes it a crime for any one not within the exempted classes to use

any such "interstate free tickets, free pass, or free transportation."

If plaintiff had not been in one of the exempted classes, it might have become a very serious question whether she could recover at all for injuries sustained while engaged in a criminal act.

The Georgia Court of Appeals pointed out that she was not engaged in a criminal act, because the federal statute excepted "laborers and their families," and very properly held that "the privilege and benefit of being afforded transportation without cost" under this federal statute may, in the trial of a case under state law, be "considered as a part of the consideration paid for the services of the employee."

This was not a denial of a federal right, but a deduction from a federal statute as evidence.

In effect, the Georgia Court of Appeals simply decided that this federal statute was evidentially a fact of some weight in determining under state law whether the so-called free pass was in fact a gratuity, that is to say utterly without consideration.

The mere discussion of federal questions in the opinions of state courts affords no legal basis for a writ of error. Howard vs. Fleming, 191 U. S. p. 126.

Such questions must be unmistakably made in the pleadings, and not left for mere inference. Mutual Life Ins. Co. vs. McGrew, 188 U. S. p. 291 (309).

WM. H. FLEMING,
Attorney for Defendant in Error.

APPENDIX

Portions of the record material to the issues raised on the motion to dismiss:

ORIGINAL PETITION IN STATE COURT.

STATE OF GEORGIA,
COUNTY OF RICHMOND.

To the City Court of said County.

Lizzie Thompson, as plaintiff, brings this action against the Charleston & Western Carolina Railway Company, as defendant, and shows:

1. Plaintiff is a resident of said County of Richmond, and defendant is a corporation existing under the laws of the State of South Carolina, but doing business and having agents therefor located in said State of Georgia, and in said County of Richmond.

2. Said defendant is a common carrier, owning and operating a line of railroad between the City of Augusta, in the State of Georgia, and the City of Spartanburg, in the State of South Carolina.

3. On October 16, 1910, plaintiff was received by said defendant company as a passenger on board its cars at the town of McCormick, in the State of South Carolina for safe transportation to the City of Augusta, Ga., and said plaintiff paid full and regular fare for transportation, and became entitled in every way to the full measure of care and diligence imposed by law on common carriers for the transportation of passengers.

4. While plaintiff was occupying a seat as a regular passenger in one of the coaches of defendant company, at a point about half way between McCormick and the next station, Plum Branch, in the State

of South Carolina, the train on which plaintiff was riding rushed into a head-on collission with another train on the same track belonging to defendant company, and going in the opposite direction from Augusto toward Spartanburg.

(Here follows details of collision, acts of negligence, etc.)

7. By reason of the negligence of defendant company as aforesaid, plaintiff was severely injured, and she has ever since suffered the most intense physical pain, in addition to the mental anguish she endured through fear of impending death at the time of the collision and since, and from the nature of the injuries, she will continue to suffer physical pain and mental anguish from the consciousness of her physical injury and loss of ability to labor, and the dread of sickness and death ensuing therefrom—all to the damage of your petitioner in the sum of $1,999.00.

Wherefore, plaintiff prays:

1. That judgment be rendered for her against defendant company for the sum of $1,999.00.

2. That process issue directing defendant company to appear at the next term of said court to answer this complaint.

WM. H. FLEMING,
Attorney for Plaintiff.

Lizzie Thompson,	City Court
vs	Richmond County.
Charleston & Western Carolina Railway Company.	March Term, 1911.
	No. 10.

ANSWER.

And now comes the defendant, and in answer to the petition in the above stated case, says:

(1) It admits the allegations of paragraph one;

(2) It admits the allegations of paragraph two;
(3) It denies the allegations of paragraph three;
(4) It denies the allegations of paragraph four;
(5) It denies the allegations of paragraph five;
(6) It denies the allegations of paragraph six;
(7) It denies the allegations of paragraph seven.

W. K. MILLER,
Defendant's Attorney.

Lizzie Thompson,
vs
Charleston & Western Carolina Railway Company.

City Court
Richmond County.

AMENDMENT TO ANSWER.

Subject to the foregoing (demurrer) and not waiving the same, defendant amends its answer, and says:

That plaintiff was gratuitously carried on its train, she riding on a free pass from McCormick, S. C., to Augusta, Ga., which provided among other things that, "The person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable, under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same. I accept the above conditions. ------x------."

And defendant pleads the same against the plaintiff and in bar against her suit, and says that she was not a passenger for hire as alleged, and that defendant is not liable for the injury for which she sues. Said pass being issued to plaintiff as wife of an employee, gratuitously under the Act of Congress known as the Hepburn Act of June, 1906, Sec. 1.

W. K. MILLER,
Deft. Atty.

Lizzie Thompson,	}	City Court Richmond
vs.		County,
C. & W. C. Railway Co..	}	March Term, 1911.

AMENDMENT TO PETITION.

Now comes the plaintiff in the above stated case, and amends her petition, by adding the following paragraph, to-wit:

She re-affirms her statement in her original petition that she bought her ticket and paid her fare from McCormick to Augusta on the trip mentioned in said petition; but she further alleges that even if it be true as testified by one of defendant's witnesses that she was riding on the free pass introduced in evidence, she was nevertheless a passenger on said train, and is entitled to recover in this action, because the law will not permit a common carrier to make a contract to excuse it from its own negligence in regard to injuries to passengers.

Allowed, This Jan. 17, 1912.

WM. H. FLEMING,
Attorney for Plaintiff.

DECISION OF COURT OF APPEALS OF GEORGIA.

Charleston & Western Carolina Railway Co. vs. Thompson.

By the Court: Russell, J.

1. As a general rule, a stipulation in a free pass, to the effect that the person who accepts such transportation himself assumes all risks of injury, is enforceable; and as to a passenger who has accepted free transportation a carrier is liable only for injuries resulting from wantonness or wilful negligence; but an exception to this rule is presented in the provision

of the Hepburn Act which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employee, and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was traveling on a free pass, she would not be entitled to recover.

2. Under the facts in this case, it was not harmful error for the court to refuse to charge that testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, or equivocal; and unless there is other evidence tending to establish his right to recover, he is not entitled to a finding in his favor, if that version of his testimony most unfavorable to himself shows that the verdict should be against him. The applicability of this rule of evidence in any particular case is addressed to the sound discretion of the court, who must determine, in the first instance, as to whether the testimony is self-contradictory, vague or equivocal. As the trial judge sees and hears the witnesses, it must be very manifest that he erred in the application of the rule, before the exercise of his discretion will be interfered with.

3. The court did not err in refusing a new trial upon the ground of the motion which was based upon newly discovered evidence that the plaintiff was not legally married to the employee of the railroad company, on account of whom the free transportation

was issued. The alleged newly discovered testimony at most only furnishes proof of a presumptive marriage; and this must yield when brought into competition with proof of an actual marriage. Upon this point the decision is controlled by the ruling of the Supreme Court in Norman vs. Goode, 113 Ga. 121. "With no competing actual marriage proved, the law presumes marriage from cohabitation and repute; but this presumption the law declines to raise in opposition to a competing marriage actually proved." Jenkins vs. Jenkins, 83 Ga. 287.

4. The evidence authorized the verdict, and there was no error in refusing a new trial.

Judgment affirmed.

Charleston & Western Carolina Railway Company. Plaintiff in Error, vs Lizzie Thompson, Defendant in Error.	In the Court of Appeals of the State of Georgia.

ASSIGNMENTS OF ERROR.

The Charleston & Western Carolina Railway Company, plaintiff in error in the above entitled cause, complains of the judgment rendered against it by the Court of Appeals of the State of Georgia, in the above case, and for error therein assigns the following:

FIRST. The Court of Appeals of the State of Georgia, committed error in holding and deciding as follows:

> "But an exception to this rule is presented in the provision of the Hepburn Act which permits a Railroad Company to issue free transportation to its employees and members of their families.

> As between such employee and the Railroad Company which employs them the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employees, and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the Court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was travelling on a free pass, she would not be entitled to recover."

The error being, in so construing and applying the Act of Congress regulating Interstate Commerce, known as the Hepburn Act of June 29th, 19096, the said Court of Appeals, in and by its said decision deprived the plaintiff in error, said Railroad Company, of the right guaranteed to it under and by the terms of the Act of Congress adopted in the year of 1887, known as the Interstate Commerce Act, and the Act amending the same approved June 29th, 1906, known as the Hepburn Act, and especially Section One, which permits and allows said Railway Company, an interstate Carrier, to voluntarily—and not by contract or compulsion, issue free transportation to certain designated classes of persons, to-wit: to its employees and their families, to ministers or religion, to secretaries of Young Men Christian Associations, to inmates of Hospitals, etc., all of whom stand on the same footing and terms under the said Act; many of whom have no contractional relation whatever with the said carrier so issuing the pass, and the Court erred in construing the said Act, wherein it held that when the carrier issued a pass to the wife of an employee, that it was not a free gratuitious pass, and erred in holding that it issued the same as a part of the

consideration due the employee on account of his employment, and that such pass was not a free pass within the meaning of said law. The said Railway Company contends that the learned Court improperly construed and applied the said Act, and by its decision denied plaintiff in error, said Railway Company, of a right guaranteed it under and by the said Act of Congress, which said Act it is respectfully submitted should have been construed as contended by said Railway Company, as allowing and permitting said Railway Company, as Interstate Carrier, to voluntarily issue to employees, and to members of their families, and others as designated in said Act, a free pass, as a mere gratuity, and not as a right or duty or obligation growing out of the fact of employment in Railway service of the husband and father. It appearing from the record in this case that said Lizzie Thompson, alleged wife of said George Thompson, Railway employee, was not employed by said Railway when injured thereon, but was travelling from McCormick, South Carolina, to Augusta, Georgia, for her own pleasure, and for no service connected with said Railway Company; and that there was no evidence of record that by or under the terms of employment between George Thompson and the said Railway Company it was ever agreed or understood that he or his family were to have, as part of the contract of his employment, transportation, on the Railway lines of said Railway Company, or that such transportation would be accorded to him and the members of his family as part of such employment.

SECOND. Because the Court of Appeals by its final judgment aforesaid committed error in overruling the exceptions of plaintiff in error and in affirming the judgment of the trial Court in striking the

plea of appellant, said Railway Company, which said plea was as follows:

> "Plaintiff was gratuitiously carried on its train, she riding on a free pass from McCormick, South Carolina, to Augusta, Georgia, which provided among other thins 'that the person accepting this free ticket agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same. I accept the above conditions.' And defendant pleads the same against the plaintiff and in bar against her suit, and says that she was not a passenger for hire as alleged, and that defendant is not liable for the injuries for which she sues. Said pass being issued to plaintiff as the wife of an employee, gratuitiously under the Act of Congress known as the Hepburn Act of June, 1906, Sec. 1."

The error being, that it deprived said Railway Company, plaintiff in error, of a right guaranteed it under the Act of Congress, of voluntarily issuing or not, in its discretion, free transportation to families of its employees on terms specified by it, and denied plaintiff in error the right to make a contract exempting itself from liability for injuries received by members of the families of empyolees while using such free transportation.

THIRD. Because the Court of Appeals in and by its final judgment aforesaid committed error in overruling the exceptions of plaintiff in error and in affirming the judgment of the trial Court in refusing

the charge requested by the said Railway Company, to-wit:

> "Plaintiff alleges that she was a passenger and had paid her fare, while the defendant contends that she had not paid such fare but was travelling on a free pass. If you find from the testimony that she was travelling on a free pass, and that such pass contained a provision that the person accepting this free pass agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from the negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same—then I charge you that she would not be entitled to recover for the injuries for which she sues."

The error being, that it deprived plaintiff in error of a right to which it was entitled under the Act of Congress, to-wit, of voluntarily issuing or not, in its discretion, free passes to families of employees, with a stipulation therein of non-liability for injuries received by them, or either of them, when travelling on such free transportation.

F. B. GRIER,
W. K. MILLER,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1913.

Charleston & Western Carolina, Railway Company, Plaintiff in Error, vs. Lizzie Thompson, Defendant in Error.

No. 751. Writ of Error from Court of Appeals State of Georgia.

Brief of Wm. H. Fleming, Attorney for Defendant in Error on Merits of Appeal.

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Brief of Wm. H. Fleming, Attorney for Defendant in Error on Merits of Appeal.

The Hepburn Act, relied upon in the appeal, has no controlling relation to the case at bar.

The only part of the act claimed to bear upon this case, reads as follows:

"No common carrier, subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, press pass, or free transportation to passengers, except to its employees and their families, its officers, agents surgeons, physicians, attorneys at law, etc.", naming various other exceptions, among them being "necessary caretakers of live stock"; "to employees on sleeping cars, express cars and to linemen of telegraph and telephone companies"; "to railway mail service employees"; "to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested."

The only substantial ground of complaint in the case at bar, is that the state court did not hold as a matter of law that a so-called free pass issued under the Hepburn act to the wife of an employee, was nec-

essarily a pure gratuity, without any consideration whatever.

The state court did not hold that a pass issued under this Act might not be a gratuity; but it did hold that the question of whether it was or not a gratuity, was an issue of fact for the jury to pass upon in the light of all of the circumstances, and that the jury would be justifiable in holding that such a so-called free pass might derive a consideration from the employment and wages of the husband in whose behalf the free ticket was alleged to have been issued to the plaintiff, Lizzie Thompson.

Upon the question as to whether a stipulation printed on the back of a purely gratuitous free pass exempting the railroad from damage arising from its own negligence is binding or not, the courts of the states are seriously divided.

Such a stipulation is held to be void as against public policy in Alabama, Arkansas, Indiana, Iowa, Minnesota, Mississippi, Missouri, Pennsylvania, Texas, Vermont, Virginia.

Such a stipulation is held to be valid in the states of Connecticut, Illinois, Maine, Massachusettes, New Jersey, New York, Washington, Wisconsin—as specified in the decision by the state court in this case, see pages 36 and 37 of the printed record.

As pointed out in the same decision on page 37, that question has never been directly decided in Georgia.

The State Court of Appeals then proceeds in the course of its opinion to argue that under the decisions of the Supreme Court of Georgia the stipulation for exemption on the back of the gratuitous ticket would be held valid.

Counsel for defendant in error in this case, respectfully dissents from the conclusiveness of that argument, and contends that under certain sections of the

Georgia Code the Supreme Court of Georgia will hold that such a stipulation is not valid.

But counsel respectfully submits that that question is not involved in this case. The real question is, not what legal result as to liability would follow if the plaintiff had been travelling on a gratuitous interstate pass? But the question is, was plaintiff, as a matter of fact, travelling on a gratuitous pass?

Every so-called "free pass" is not a gratuity. Many of such passes have a valid consideration behind them, and when there is a consideration, the stipulation for exemption is void, as held by all courts.

This Court in the case of Railway Co. vs. Stevens, 96 U. S. 655, expressly held, that one of these so-called free passes, issued to a man seeking to sell a patent to the road, had a valid consideration, which prevented the railroad fro mclaiming exemption from liability for personal injuries—Citing the Lockwood case in 17 Wallace, 557, where a "drover's pass" was held not to be a gratuity.

That a free pass given to a caretaker of stock was not a gratuity was held in 50 N. E. A. 10-19. The same principle was held as to the caretaker of stock in a special car, in 65 At. Rep. 386.

Also the same principle was held where a free pass was issued to the wife of a witness for the railroad, in 54 S. E. 255. And the same principle was also applied in the case of an employee, where the free pass was embraced in the terms of his employment. 79 N. E. 748.

The logical result of the contention of counsel for plaintiff in error in the case at bar, would be to have this Court declare that all the so-called free passes issued under the Hepburn Act, are, as a matter of law,

See 227 US 601-610. Southern Pacific Co v Schuyler
Liability under free pass is a state and not a
federal question

gratuitous—and afford a complete defense against claims for personal injuries, when a stipulation for immunity is printed on the back of the pass.

To do that, would require this Court to hold that Congress in passing the Hepburt Act, intended to change the principle of law ruled by this Court in 17 Wall., and in 95 U. S. above cited, and to relieve the railroads from liability for personal injuries, to which they had previously been subject.

Clearly the Hepburn Act had no such scope. It was intended to prevent discrimination; not to relieve from liability for personal injuries.

In the Hepburn Act, the words "free pass" were used in the ordinarily accepted sense, and not necessarily as a pure gratuity. The mere fact that the railroad company in its plea in the state court claimed that the alleged pass was issued under the Hepburn Act, does not show that the railroad had any right under that act, as a defense to the case.

In the case of Price vs. Penn. Railroad Co., 113 U. S., 218, the plaintiff pleaded a federal statute in regard to the railway mail clerks being transported without extra charge along with the mail matter; but this Court held that no federal quesion was involved—because the federal statute conferred no special right on the plaintiff—and dismissed the case for want of jurisdiction.

In citing the Price case, approvingly, this Court in 192 U. S. 371 (385) say:

"We repeat that the rule is settled that a case does not arise under the constitution or laws of the United States, unless it appears from plaintiff's own statement in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated

by one construction of the constitution or laws of the United States, or sustained by the opposite construction." Citing numerous decisions.

In affirming the verdict in favor of the plaintiff, it was only necessary for the Georgia State Court of Appeals to hold that the plivilege of receiving such a pass for his wife, might have been a part consideration inducing the husband to accept employment from the railroad, and that the determination of this question of fact was properly within the province of the jury.

It was not at all necessary to the decision of the case, that the Georgia Court of Appeals should say (if they really did say it) that this provision of the Hepburn Act permitting free passes, established an "exception" to the general law that a stipulation for immunity from damages on the back of a free pass would relieve a road from liability.

Strictly and logically speaking, the Hepburn Act creates no "exception" to that general rule of law where it obtains based upon a pass that is admittedly gratuitous, or without any consideration; but it does show that the issuance of such a pass is not in itself illegal, and it also raises a strong presumption that in giving such a pass to the wife of an employee, there is a good and valid consideration.

The Hepburn Act does not require free passes to be issued to employees and their families. It only creates a privilege to be exercised by the officers of the road, and this privilege can not fail to be of great advantage to the road in securing labor at reduced rates, and in getting faithful service, and in maintaining good discipline in the hope of reward. As such, this privilege enters as a factor into the consideration of the employment.

From first to last plaintiff contended that she was not riding on a free pass, but on a regular ticket, bought and paid for.

Whether the trial court was right or wrong in rejecting the amendment to the answer seeking to set up an express contract based on the alleged free pass was not before the State Court of Appeals—see statement in the opinion on page 35 of the printed record.

WM. H. FLEMING,
Atty. for Lizzie Thompson.

A rejected amendment is no part of the record and is not before the reviewing court unless embodied in the bill of exceptions (which was not done in this case)

See 8 Ga. App. 282 Ledbetter v. Savannah Brewing Co.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 751.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, PLAINTIFF IN ERROR,

against

LIZZIE THOMPSON, DEFENDANT IN ERROR.

WRIT OF ERROR TO COURT OF APPEALS OF THE STATE OF GEORGIA.

BRIEF OF PLAINTIFF IN ERROR UPON THE MERITS.

PRELIMINARY STATEMENT.

The defendant in error, Lizzie Thompson, (plaintiff below) brought suit in the City Court of Richmond County, Ga., for damages on account of personal injuries alleged to have been received in a collision near Plum Branch, S. C., Oct. 16, 1910, while she was a passenger on one of defendant's trains, en route from McCormick, S. C., to Augusta, Ga.

The plaintiff claimed that she had bought and paid for a ticket from McCormick, S. C., to Augusta, Ga. The defendant claims that as the wife of George Thompson, one of its employees, the plaintiff had been furnished with a free pass for herself and two children from Augusta, Ga., to McCormick, S. C., and return, and that while using the return portion of the pass between McCormick, S. C. and Augusta, Ga. the collision at Plum Branch, S. C. of which she complains occurred; that said pass was issued to her gratuitously, as the wife of one of its employees, under the provision of the Hepburn Act of Congress and that it was issued, accepted and was

being used upon condition that the railroad company should not be liable to her in damages for any personal injury sustained by her in consequence of the negligence of the railroad company; said condition being printed upon the back of said pass and assented to by her.

These facts were set up by the defendant in its amended answer, but upon motion of the plaintiff the defense was stricken, the trial court holding that it made no difference whether the plaintiff had paid her fare or was riding upon a free pass; that the limitation relied upon in the free pass would not exempt the defendant from liability for negligence.

Upon the trial the defendant submitted the following request to charge which was refused by the court:

"Plaintiff alleges that she was a passenger and had paid her fare, while the defendant contends that she had not paid such fare, but was traveling on a free pass. If you find from the testimony that she was traveling on a free pass, and that such pass contained a provision that the person accepting this free pass agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the passenger using the same, then I charge you that she would not be entitled to recover for the injuries for which she sues."

The defendant appealed to the Court of Appeals of the State of Georgia, that being the Court of last resort in that State for this case, assigning error in the striking out of said plea and in the refusal of said charge.

The Court of Appeals rendered its decision affirming the judgment of the Court below. The Court sustained the defendant's contention in part, holding: "As a general rule a stipulation in a free pass to the effect that the person who accepts such transportation himself assumes all risks of injury is enforceable; and as to a passenger who has accepted free transportation, a carrier is liable only for injuries resulting only from wantonness or wilful negligence," but construed the Hepburn Act as changing this rule: "But an exception to this rule is presented in the provision of the Hepburn Act which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration for the services of the employees and may be treated as an element of value within the contemplation of

both parties at the time of entering into the contract of employment. Consequently the Court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was traveling on a free pass, she would not be entitled to recover."

LAW POINTS.

We invite the Court's attention to the following propositions:

1

Under the provisions of the Hepburn Act, an interstate carrier is authorized to issue a free pass, as a gratuity to an employee or to his family. The Court of Appeals of Georgia denies this right.

2

As an incident to the right to issue a free pass, as a gratuity, to an employee or his family, the carrier has the right to impose upon the issuance, acceptance, and use of such a pass the condition that the carrier shall not be liable in damages for personal injury to the recipient in consequence of its negligence. In denying the right to issue such free pass, the Court of Appeals denies the right of limitation incident to such primary right.

3

Under the provisions of the Hepburn Act and the Inter-State Commerce Law, an interstate carrier is authorized to issue only gratuitous passes to its employees or their families; it is not authorized to issue a pass in part payment of the employee's services, in fulfillment of an obligation to that effect undertaken at the time and as a part of the contract of service.

4

Even if under the Hepburn Act an interstate carrier is authorized to issue a pass to an employee or his family in part payment of the employee's services, in fulfilment of an obligation to that effect undertaken at the time and as a part of the contract of service, it was error in the Court of Appeals of Georgia to hold, in the absence of evidence of a contract to that effect, that under the provisions of the Hepburn Act the issuance of a pass to an employee or his family is referable to such obligation.

5

The Court of Appeals of Georgia is in error in holding that a proper construction of the Hepburn Act forces the con-

struction that the plaintiff, the wife of an employee, riding upon a pass extended to her under the authority of that Act, was a passenger for hire and not bound by the limitation imposed upon the issuance, acceptance and use of such pass. The Court should have held that under said Act the carrier had the right to issue a free pass with the conditions referred to; that in the instant case it did issue such a pass; that there was no evidence to show that the pass was other than a gratuity; and that the recipient was bound by such conditions.

ARGUMENT.

Proposition I.

UNDER the PROVISIONS of the HEPBURN ACT, an INTERSTATE CARRIER is AUTHORIZED to ISSUE a FREE PASS, as a GRATUITY to an EMPLOYEE or to HIS FAMILY. The COURT of APPEALS of GEORGIA DENIES this RIGHT.

There cannot be a doubt as to the correctness of the first paragraph in this proposition. The Act expressly authorizes the issue of a "free pass," "free ticket," "free transportation" to an employee or his family. The contention that the Court of Appeals of Georgia denies this right requires demonstration.

The defendant in error at page 4 of the Brief upon motion to dismiss, heretofore filed, says:

"Neither the plaintiff nor the Judge of either the trial court or the reviewing court ever questioned this right."

This is a plain concession of the carrier's right to issue a free pass, but counsel is far afield in saying that the Appellate Court concedes this right. That Court holds that the pass authorized by the Act is not a free pass at all but a pass issued in fulfilment of the obligation undertaken at the time and as a part of the contract of service to furnish transportation to employees. They say:

> "As between such employees and the railroad company which employs them the privilege and benefit "of being afforded transportation without cost may "be considered as a part of the consideration paid for "the services of the employee and may be treated "as an element of value within the contemplation of "both parties at the time of entering into the contract of employment."

This conclusion the Appellate Court draws from the terms of the Hepburn Act, according to the opinion first filed. (Transcript page 21, folio 46); they say:

"But an exception to this rule is presented in the

"provisions of the Hepburn Act which permits a rail-
"road company to issue free transportation to its
"employees and members of their families."

There was not a particle of evidence, and the Court does not claim that there was, to the effect that the contract of employment included an obligation on the carrier's part to furnish to its employees free transportation.

According to the decision of the Court, therefore, in every instance of the issuance of a pass to an employee, whether in fulfilmnt of the obligation to furnish free transportation, assumed as a part of the contract of employment, or in the absence of all evidence of that fact, the issuance of the pass is referable to that obligation, and is treated as such. If, then, every instance is referable to this obligation, whether shown to exist or not, there can be no instance referable to gratuity.

This conclusion, therefore, places the issuance of a pass to an employee upon a contract basis, supported by a valuable consideration, and this construction removes it absolutely from the domain of a gratuity.

It is true that the Court, in its revised opinion filed Feb. 24, 1914, months after the Writ of Error had been sued out and the Record completed, to some extent modifies the ruling in the original opinion. But we submit that such revised opinion is not under review upon this appeal and cannot be resorted to for the purpose of supporting the original decision. It has no proper place in this record.

The revised opinion, the Court says that in view of the declaration above quoted: "Such a free pass cannot be treated as necessarily a gratuity. In the absence of evidence to the effect that the alleged free pass now involved was not within the contemplation of the parties and in view of the well known custom, which was recognized by Congress as obtaining between carriers and their employees, we cannot hold that the jury was not authorized to infer (if indeed they believed the plaintiff was riding upon a pass) that the grant of this privilege entered into the consideration of the contract of employment, and that the services of the husband supplied at least some such consideration for the transportation as made plaintiff a passenger for hire." This, we respectfully submit, does manifest injustice to the plaintiff in error. After holding in the original opinion that the pass was referable upon the Hepburn Act solely to the implied obligation upon the carrier to furnish free transportation, the Court now qualifies that by holding that the pass was not *necessarily* a gratuity and throws the issue back on what the jury may have inferred from the absence of testimony that the pass in question was not issued as an incident of the contract of employment. That

issue was not before the jury at all. The trial Court had stricken the defense of the carrier, holding that it made no difference whether the plaintiff was riding on a free pass or not, the limitation of liability was void. No question under the Hepburn Act was permitted by the Court. The Appellate Court disagreed with the trial Court upon the general question of limitation of liability in a free pass, but of its own motion raised the question of the applicability of the Hepburn Act.

The pass showed upon its face that it was a "free ticket," so declared at two places and so accepted by the plaintiff. The burden was not upon the defendant to prove that it was not issued as an incident of the contract of employment, but, if the plaintiff desired to show that it was not what it purported upon its face to be, the burden was upon her to prove that it was issued as an incident of the contract of employment.

If the trial Court had held that the limitation was good if the pass had been issued as a gratuity but bad if issued as a part of the contract of employment and had left that issue of fact to the jury, there would have been some consistency in the revised opinion of the Court, but the trial Court did not do this; they struck the plea entirely, holding that the limitation in the pass was entirely void whether issued as a gratuity or as a part of the contract. The appellate court, in its first opinion, reverses the trial court upon the question of a limitation in a gratuitous pass, but holds that under the Hepburn Act the pass is of necessity referable to the contract obligation. In its revised opinion it holds that the pass is not necessarily a gratuity, but that in the absence of evidence that the pass was not issued as a part of the contract of employment, the jury, from whom the issue had been entirely taken away, were authorized to find that it was issued as a part of the contract of employment.

We submit that this later modification is an impotent effort to sustain a construction clearly erroneous.

PROPOSITION II.

As an incident to the right to issue a free pass, as a gratuity, to an employee or his family, the carrier has the right to impose upon the issuance, acceptance and use of such pass the condition that the carrier shall not be liable in damages for personal injury to the recipient in consequence of its negligence. In denying the right to issue such free pass, the Court of Appeals denies the right of limitation incident to such primary right.

This proposition is sustained by the following cases:

Northern Pacific R. Co. vs. Adams, 192 U. S. 441.

Boering vs. Ry. Co., 193 U. S. 442.
Hutto vs. Ry. Co., 75 S. C. 295.
C. & W. C. Ry. Co. vs. Thompson (Case at bar).

Of its correctness, there cannot be a doubt. If, then, the Appellate Court has denied the right of the carrier to issue a free pass to an employee, as a gratuity, as we contend in Propostiion I, clearly it denies the incident to that right of annexing the condition claimed.

The *Adams* case was decided in 1904, just two years before the passage of the Hepburn Act. The Congress therefore in permitting the issuance of free passes to employees and others, must have recognized the right of the carrier to stipulate for this exemption so recently established by the Court.

PROPOSITION III.

Under the provisions of the Hepburn Act and the Inter-State Commerce Law, an interstate carrier is authorized to issue only gratuitous passes to its employees or their families; it is not authorized to issue a pass in part payment of the employee's services, in fulfilment of an obligation to that effect undertaken at the time and as a part of the contract of service.

There are just three forms in which transportation may be furnished by a carrier to its employeees, without reference to the legality of the several transactions:

1. Upon payment of fare, as any other person would do;
2. The issuance of a pass in pursuance of a contract, making the furnishing of transportation a part of the contract of employment;
3. The issuance of a pass as a gratuity, irrespective of and disconnected from any obligation incurred as a part of the contract of employment.

As to the first and third there appears no legal obstacle. An employee may prefer to pay his fare and perserve all indemnity against the carrier in case of injury. The Hepburn Act explicity permits the third. The point of contention is whether under the law the carrier can issue the second form.

It cannot be questioned, we submit, that unless the authority to issue such a pass can be drawn from section 1 of the Hepburn Act, it does not exist. Section 6 of the Act provides:

"* * * * No carrier, unless otherwise provided by this Act, shall * * * * charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit

in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

In the case of *Louisville & Nashville R. R. Co. vs. Mottley*, 219 U. S. 467, the facts were these:

In 1871 Mr. and Mrs. Mottley, in settlement of a claim for damages for personal injuries had entered into an agreement with the railroad company by which the latter promised that during their lein they should have free passes upon the railroad. After the passage of the Hepburn Act the company which up to that time had faithfully lived up to the contract declined to further comply. The Supreme Court of Kentucky sustained a judgment of the Circuit Court requiring the Company to continue the issue of the passes. Upon writ of error, the Supreme Court of the United States reversed the judgmnt of the State Court holding that the Act prohibited the carrier from furnishing transportation for a "greater or less or different compensation" than that fixed in its published tariff; that the payment therefor must be made in money; and that the case of the plaintiffs did not fall within any of the excepted classes set out in Section 1. They say:

> "It is now the established rule that a carrier can-
> "not depart to any extent from its published rates for
> "interstate transportation on file without incurring
> "the penalties of the statute. (citing cases). That
> "rule was established in execution of a public policy
> "which, it seems, Congress deliberately adopted as
> "applicable to the interstate transportation or per-
> "sons or property. *The passenger has no right to*
> *"buy tickets with services, advertising releases or*
> *property, nor can the railroad company buy services,*
> *"advertising releases or property with transporta-*
> *"tion.*"

Again:

> "The statute manifestly means that the purchase
> of a transportation ticket by a passenger and its sale
> "by the company shall be consummated only by the
> "former paying cash and by the latter receiving cash
> "of the amount specified in the published tariffs."

Again:

> "But the purpose of Congress was to cut up by
> "the roots every form of discrimination, favoritism
> "and inequality, except in certain excepted classes
> "to which Mottley and his wife did not belong and

"which exceptions rested upon peculiar grounds."

Again:

"It solved the question when, without making any "exceptions of *existing contracts, it* forbade by broad, "explicit words *any* carrier to charge, demand, col- "lect or receive a 'greater or less or different com- "pensation' for any services in connection with the "transportation of passengers or property than was "specified in its published schedules of rates. The "Courts cannot add an exception based on equitable "grounds when Congress forebade to make such an "exception. The words of the act must be taken to "mean that a carrier engaged in interestate com- "merce, cannot charge, or collect or receive for trans- "portation anything but money."

In *Armour Co. vs. U. S.*, 209 U. S. 56, the Court said:

"There is no provision excepting special contracts "from the operation of the law."

In *Chicago etc. R. Co. vs. U. S.*, 219 U. S. 486, following the *Mottley* case, this Court decided that a carrier cannot accept any compensation other than cash for interstate transportation, and that the delivery of such transportation in exchange for advertising is a violation of the act. The Court says:

"The legislative department intended that all who "obtained transportation on interstate lines should "be treated alike in the matter of rates and that all "who availed themselves of the services of the rail- "road company (with certain specified exceptions) "should be on a plane of equality. Those ends can- "not be met otherwise than by requiring transporta- "tion to be paid for in money which has a certain "value known to all and not in commodities or ser- "vices or otherwise than in money."

In the *Mottley* case, it was sought to overcome the defendant's position by contending that the passes in question were not *free* passes; as to this point, the Court says:

"It is further said that the passes contemplated by "the parties were not strictly free passes; for, it is "argued, the railroad company would receive a val- "uable consideration for each one issued by it. This "view is more plausible than sound, and does not meet "the difficulty. Suffice it to say, in this case, that such "passes, when issued, would be illegal under the act "of Congress, by reason of their not being paid for "in money, according to the company's schedule of

"rates, but in consideration only of the release by
"Mottley and wife of their claim for damages on ac-
"count of the collision in question."

The Court of Appeals of Georgia distinctly refer the issuance of passes to employees to a contract basis, a *quid pro quo*. They say that the carrier thereby obtains the services of the employee at a reduced rate of wages. The carrier then necessarily is furnishing transportation for services, a transaction expressly prohibited.

But, it may be argued, what difference does it make whether the carrier issues to employees passes for services or passes gratuitously? The answer is this:

If the transportation can be paid for in service as fixed by agreement of the parties, then the rate to be charged for each transportation becomes a *variable quantity*. In *Nebraska vs. Union Pacific*, 87 Neb. 31 L. R. A. (N. S.) 657, it is said in the head note:

"A contract which proivdes for transportation to be issued in exchange for newspaper advertising, or for services the value of which is indeterminate, and which permits the amount to be paid for such service to be fixed by agreement of the parties, leaves the rate charged for the transportation a *variable quantity*."

Under the ruling of the Court below the *rate* to be charged, or the consideration to be received by the company for transportation of members of the family of an employee, would depend upon the contract made by the railroad company with each individual employee. The value of this service would vary in each case, even employment in the same service would likely be paid for, in greater or less or different transportation, as occasion might arise. All this would bring about confusion, unjust and unreasonable discrimination would occur, and the main purpose of Congress destroyed. That purpose has often been expressed by this Court, and notably by his Honor the Chief Justice, in *New York, New Haven & Hartford vs. Interstate Commerce Commission*, 200 U. S. 361-391, 50 L. E. 521, to be "That the great purpose of the 'Act to regulate commerce, while seeking to prevent unjust and unreasonable rates, *was to secure equal rates*, ... as to all, and destroy favoritism, this last being accomplished by requiring a publication of a tariff, and forbidding rebates, preferences, and all other forms of undue discrimination." If the right to transportation can be fixed by private contract for service, or annexed to any contract for service, then one employee could be afforded an infinite amount of transportation for less service than would be afforded to another. This service and the transportation would vary and all equality

would be destroyed, favoritism would be rampart, and the act of Congress defeated. But under the Act all transportation must be paid for, according to the published rates, with the exception of free transportation, that is, where the carrier is to receive nothing. Such free transportation is permitted to certain classes mentioned in Section One of the Act. The transportation thus allowed is designated as "Interstate free ticket," "Free pass," "Free transportation for passengers," etc. Among others, this may be extended to "employees and their families." Such free transportation as transportation cannot be paid for, either in money, service, advertising, commodities, releases, rebates or in anything else. Such transportation is to be free not compulsory. The carrier is not compelled to issue such free pass, but is permitted to do so. It is not required to issue a free ticket to the parties named in the classes, but that is left to its discretion. When we bear in mind the old conditions, the evils of the pass system, and remedies provided by Congress against such indiscriminate transportation, given for all sorts of service, advertising, newspaper articles, etc., etc., to the advantage of one and disadvantage of another, we know that Congress intended and by the Act did prohibit these conditions. All transportation must now be paid for in money, except in those few instances where the carrier is permitted to issue gratuitously a free pass or free transportation, as to employees and their families. As it is free, it is gratuitous, and the conditions upon which such free and gratuitous pass may be issued are by Congress left with the carrier. The provision in such tickets that the carrier shall not be liable in damages for negligence met the approval of this Court in the *Adams* and *Boering* cases, and Congress did not see fit to change the ruling in these cases by the Act in question, but adopted it by permitting free passes to be issued as stated and this Court will not now make exceptions in the Act not made by Congress.

If, then, the issuance of a pass in fulfilment of an obligation incurred with the contract of employment cannot be justified outside of section 1 of the Act, can it be under that section?

The section speaks of "free pass," "free ticket," "free transportation." It prohibits the issuance of such to the general public with the exception of certain classes therein specified. The classes within the exceptions can receive only that which is prohibited generally, that is to say, "free tickets," "free passes," "free transportation." That which is paid for either in cash or in services cannot be "free."

A contractual relation is not the line of demarcation between those who can and those who cannot receive free transporta-

tion; for among the excepted classes there are more who sustain no contractual relation with the carrier than otherwise.

To hold that because free passes may be issued to employees, passes based upon contracts of service may also be issued, is to interpolate into the Act that which is not there; to throw down the gap and permit the issuance of passes based upon contracts of all sorts with each one of the non-contractual classes. In the *Mottley* case, it is said:

"Manifestly, from the face of the commerce act itself, Congress, before taking final action, considered the question as to what exceptions, if any, should be made in respect to the prohibition of *free* tickets, *free* passes and *free* transportation."

But, it may be argued, notwithstanding the inhibition this pass may have been issued in fulfilment of the obligation referred to. If so, the plaintiff was a violator of the law, she was on the train as a trespasser and no rights under the contract could have inured to her benefit. The only duty we owed her was to refrain from wilfully injuring her.

In the *Mottley* case, it is said: "After the commerce act came into effect, no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any Court," quoting much authority to sustain that position which the Court declares "Is thoroughly established."

In *Smith vs. R. Co.*, 194 Fed. 79, an employee traveling upon a pass similar to that in question was injured and brought suit for damages. The Circuit Court of Appeals of the Eighth Circuit, (Judges Van Devanter, Amidon and Riner) held, without an intimation that the plaintiff had received the pass by virtue of his contract of employment, that he was a gratuitous passenger and bound by the limitation contained upon his pass; that "the pass was a gratuity and imposed no legal obligation."

The difference between the two kinds of passes is well expressed in the following case from Massachusetts, applicable to a condition not controlled by the commerce act:

> "If the respondent's transportation constituted a "portion of the consideration for his services, he "became a passenger for hire, just the same as any- "body else who parts with anything of value for "transportation; but if the consideration for his ser- "vices is independent of his transportation, and his "transportation is a mere gratuity bestowed upon "him by his employer, as pleaded in the fourth sep- "arate defense herein, he stands like any one else "traveling on a free pass so conditioned, notwith-

"standing his employer would not probably have be-
"stowed the transportation if the recipient had not
"been in his employ."—*Peterson vs. R. R. Co.*, (Mass.) 53 L. R. A. 586.

Congress, we may well infer, had this distinction in mind and in the grant of the power to issue a *free* pass and the denial of the power to issue one based upon contract, intended to preserve the carrier all the incidents attached to the issuance of a *free* pass.

PROPOSITION IV.

Even if under the Hepburn Act an interstate carrier is authorized to issue a pass to an employee or his family in part payment of the employee's services, in fulfilment of an obligation to that effect undertaken at the time and as a part of the contract of service, it was an error in the Court of Appeals of Georgia to hold, in the absence of evidence of a contract to that effect, that under the provisions of the Hepburn Act the issuance of a pass to an employee or his family is referable to such obligation.

We submit that there is absolutely nothing in the Hepburn Act which requires such a construction. Under the assumed state of the law, it would have been incumbent upon the carrier to prove that the plaintiff was riding upon a free pass and therefore bound by the conditions. The carrier produced the pass, termed upon its face a free ticket and accepted as such. In the face of this testimony, it was incumbent upon the plaintiff to prove that it was issued in pursuance of a contract of employment covering the transportation of the employee and his family; and, not only that, but covering the unlimited transportation. If resort can be had to assumption and custom, it is as readily conceived that the custom was to issue passes with the limitation as without; that the contract covered transportation of the very kind issued as that without such limitation. The section provides for no presumption.

PROPOSITION V.

The Court of Appeals of Georgia is in error in holding that a proper construction of the Hepburn Act forces the construction that the plaintiff, the wife of an employee, riding upon a pass extended to her under the authority of that Act, was a passenger for hire and not bound by the limitation imposed upon the issuance, acceptance and use of such pass. The Court should have held that under said Act the carrier had the right to issue a free pass with the conditions referred to; that in the instant case it did issue such a pass; that there was

no evidence to show that the pass was other than a gratuity; and that the recipient was bound by such conditions.

This is but a resume of the points already discussed.

Respectfully submitted,

F. B. Grier,
W. K. Miller,
T. P. Cothran,
Attorneys for Plaintiff in Error.

Greenwood, S. C., March 25, 1914.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 751.

CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, PLAINTIFF IN ERROR,

against

LIZZIE THOMPSON, DEFENDANT IN ERROR.

WRIT OF ERROR TO COURT OF APPEALS OF STATE OF GEORGIA.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTION TO DISMISS.

GROUNDS OF MOTION.

The sole ground of the motion is thus expressed by the defendant in error:

"That the Supreme Court of the United States has no jurisdiction because no Federal question is involved." It will be observed that the defendant in error does not base the motion upon the ground also that the Federal question, if arising, does not appear to have been specially claimed and set up, seasonably presented, by the plaintiff in error, in the State Court, although the attempt is made to argue this proposition in the Brief submitted.

PRELIMINARY STATEMENT.

The defendant in error, plaintiff below, is the wife of one George Thompson, an employee of the plaintiff in error, an interstate carrier, operating a line of railroad from Greenville and Spartanburg, in the State of South Carolina, to Augusta, in the State of Georgia.

On October 10, 1910, she was a passenger on a train of the plaintiff in error going from Augusta, Ga., to McCormick, S. C. At Plum Branch, an intervening station, she was injured in a head-on collision. She brought suit for damages in the city Court of Richmond county, Ga., alleging that she had purchased a round-trip ticket from McCormick to Augusta, and was injured as she was returning on this ticket from Augusta to McCormick. The plaintiff in error claimed that she had not purchased a ticket, but was riding upon a free pass issued by the railway company to her as the wife of one of its employees, George Thompson, upon the express condition and agreement that the railway company should not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person or for any loss or damage to property of the passenger using said pass; that said pass was issued to the plaintiff gratuitously as the wife of an employee under the Act of Congress known as the Hepburn Act of June, 1906. These facts were set up by the railway company as a defense to the plaintiff's cause of action.

The plaintiff demurred to the plea of the defendant company upon the ground that it did not contain facts sufficient to constitute a defense. The demurrer was sustained by the Court and the plea was stricken out. The defendant duly excepted to such ruling and order. The case proceeded to trial, during which the defendant submitted to the Court the following request to charge:

"Plaintiff alleges that she was a passenger and had paid her fare, while the defendant contends that she had not paid such fare, but was traveling on a free pass. If you find from the testimony that she was traveling on a free pass, and that such pass contained a provision that the person accepting this free pass agrees that the Charleston & Western Carolina Railway Company shall not be liable under any circumstances, whether from the negligence of agents or otherwise, for any injury to the person, or for any loss or damage to the property of the

passenger using the same, then I charge you that she would not be entitled to recover for the injuries for which she sues."

The request was refused, to which refusal exceptions were duly filed. The trial resulted in a verdict of $1,300 in favor of the plaintiff.

The defendant appealed to the Court of Appeals of the State of Georgia, that being the Court of last resort in that State for this case, assigning error in the striking out of said plea and in the refusal of said charge.

The Court of Appeals rendered its decision affirming the judgment of the Court below. The Court sustained the defendant's contention in part, holding: "As a general rule a stipulation in a free pass to the effect that the person who accepts such transportation himself assumes all risks of injury is enforceable; and as to a passenger who has accepted free transportation, a carrier is liable only for injuries resulting only from wantonness or wilful negligence," but construed the Hepburn Act as changing this rule: "But an exception to this rule is presented in the provision of the Hepburn Act which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be considered as a part of the consideration paid for the services of the employees and may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. Consequently the Court did not err in refusing to charge the jury that if the plaintiff (who was the wife of an employee) was traveling on a free pass, she would not be entitled to recover."

ARGUMENT.

We submit that if the construction placed by the Court of Appeals of Georgia upon the Hepburn Act should be sustained, the effect will be twofold:

1. The interstate carrier will not have the right to issue to its employees and their families a free pass, that is a pass which is a gratuity.

2. As a corrolary to this proposition, the carrier will not have the right to issue such free pass and attach to its issuance, acceptance and use the condition that the user of the pass shall assume all risk of injury.

The Court of Appeals holds that the issuance of a pass to employees and their families is but the fulfillment of an obligation assumed by the carrier as a part of the consideration paid for the services of the employee. This, of course, places the issuance of the pass upon a contract basis, supported by a valuable consideration, and removes it absolutely from the domain of gratuity. It in effect holds that the only kind of pass permitted to be issued to employees and their families is a pass based upon value received, which, of course, denies to the carrier the right to issue a pass which is a gratuity; that is, one not based upon value received. The plaintiff in error claims that it has the right under the Act to issue free passes, gratuities; the Court holds that it has only the right to issue passes for value received. The plaintiff in error claims that the Court converts what under the Act is a gratuity into a contract supported by a valuable consideration; and in addition, or as a corollary to this ruling, deprives it of a right under that Act to issue a free pass upon terms which it had the right to fix, and of the benefit of an exemption contained in those terms. Both the right to issue a *free pass* to its employee, a gratuity, and the right to impose conditions in issuing such free pass are denied by the decision of the Court.

While the defendant in error does not urge as a ground of this motion the contention that the plaintiff in error has not specially claimed or set up the Federal question, so as to warrant the entertainment by this Court of the writ of error, for the sake of argument, we will assume that he has. The questions then for discussion are these:

1. Is the defense of the defendant a claim of a right or immunity under a statute of the United States?

2. If so, has the defendant complied with the jurisdictional requirement to specially set up and claim that right or immunity?

3. If so, has the Court of Appeals of Georgia correctly construed the Hepburn Act?

I.

IS the DEFENSE of the DEFENDANT a CLAIM of a RIGHT or IMMUNITY under a STATUTE of the UNITED STATES?

There can be no doubt as to the proposition that the Act permits the carrier to issue a free pass to an employee or a

member of his family. The Act so declares, specifically. The defendant in error says, at page 4 of the Brief:

"Neither the plaintiff nor the Judge of either the trial Court or the reviewing Court ever questioned this right?" This is a plain concession of our right to issue a free pass, but counsel is far afield in saying that the Appellate Court conceded this right. The Court, as we have seen, holds that the pass authorized by the Act is not a free pass at all, but an incident of the contract of service. The right to issue a free pass is a plain right conferred by the Act and claimed by the plaintiff in error in its answer.

But, in addition to this, the plaintiff in error claimed the right, not only to issue a free pass, as it was authorized to do under the Act, which right, as we have seen, is denied by the Court of Appeals, but also as an incident of that right to impose the conditions upon its acceptance and use to which reference has been made.

While this latter right is not specifically conferred by the Act, its exercise is clearly implied as an incident of the right conferred and may logically be held to flow from the Act. It is conceded that at the time of the passage of this Act a carrier issuing a free pass had the right to impose this exemption as a condition of its acceptance and use, under the laws of South Carolina where the injury occurred, of Georgia, where the case was tried, and of the United States, in whose jurisdiction we now are.

Hutto v. *R. R. Co.*, 75 S. C., 295.
R. Co. v. *Thompson*, Ga. (this case).
R. Co. v. *Adams*, 194 U. S., 440.

The last cited case was decided in 1904, just two years before the passage of the Hepburn Act The Congress, therefore, in permitting the issuance of free passes to employees and others, must have recognized the right of the carrier to stipulate for this exemption so recently established by the Court. The Act contains a general prohibition against the issuance of free passes, with certain exceptions, among which are employees and their families. But for this exception the pass in question would have been illegal. The permission, therefore, to issue such passes conferred a right, a privilege, an immunity to the carrier; a specific right to issue such passes and immunity from punishment for so doing. The right to issue such free passes was, not simply the right to make them

out and hand them to the employees, but the conferring of that right included also every other right which was at that time legally incident to the right conferred; one of which established by the Court was to impose the contractual exemption clause. Hence the right to impose the condition is as directly traceable to the Hepburn Act as the right to issue the free pass. The latter necessarily includes the former.

II.

IF the DEFENSE of the DEFENDANT be a RIGHT or IMMUNITY under the HEPBURN ACT, HAS it been SO PRESENTED in the STATE COURT as to JUSTIFY this COURT in ENTERING the WRIT of ERROR?

The statute requires that the right or immunity under a Federal law must have been specifically claimed or set up in the State Court; and the question is, does the record show that the plaintiff in error has complied with this requirement?

In determining this question it is essential to bear in mind the claim of right which the plaintiff in error now insists upon. That claim, as we have seen, is twofold: (1) The right to issue a free pass, a gratuity, to its employees and their families; (2) That incidental right to impose conditions upon the acceptance and use of such free pass.

The answer sets up the plea that the carrier issued, as it was authorized to do under the Hepburn Act, a free pass to the wife of one of its employees; that this pass was issued as a gratuity; that it was issued, accepted and used upon condition that the passenger assumed the risk of injury.

We submit that the writ of error can be sustained upon the ground alone of the allegation in the answer that the plaintiff in error was authorized under the Act to issue a *free pass* to its employee or to a member of his family; which right, as we have seen, is denied by the Court of Appeals. It can be sustained upon the further ground of the allegation of a right incident to the right of issuing a free pass specifically conferred by the Act. In fact, the allegation of the right to issue a free pass must be held to include all the rights incident to the exercise of that right, one of which is to contract for exemption.

With the allegation of the right to issue a free pass under the Act, which of itself carried the incidents of that right, and with the additional specification of this incidental right, it

could not have been necessary to allege that this incidental right was unimpaired by the Act. In view of the unanticipated construction of the Act by the Court of Appeals, in order to meet the criticism of the defendant in error, we should have alleged, not only our right under the Act to issue a free pass, but the incidental right to issue it upon conditions and that the Hepburn Act had not impaired the incidental right. In other words, we should have anticipated the extraordinary ruling of the Court of Appeals and alleged a contrary construction. In no other way than that adopted could we have met the objection at that time.

The trial Court did not base its decision upon the construction of the Act given by the Court of Appeals. Quoting from the Brief of counsel for defendant in error, page 2, paragraph 3:

"The trial Court struck this plea of a free pass—holding that under the State law, the railway was liable, regardless of whether plaintiff was riding on a bought ticket, as she contended, or a free pass, as the railroad contended.

"The trial Court also refused to give in charge to the jury a written request presented by counsel for the railway to the effect that if plaintiff was riding on a free pass with waiver of right to damages the railway was not liable."

That Court based its ruling upon the broad proposition that it made no difference whether the plaintiff was riding on a free pass or not; if on a ticket, the defendant was liable; if on a free pass with waiver of liability, the waiver would not protect the defendant. Note the difference between the ruling of the trial Court and that of the Court of Appeals. The former characterizes the pass as a "free pass," a gratuity; the latter as not a free pass, but a contract supported by a consideration. The appeal was from the ruling of the trial Court, that it was a free pass with an attempted waiver of the right to recover damages, which waiver was ineffectual; not from any construction of the Hepburn Act. There was, therefore, no opportunity for the defendant in that appeal to raise the Federal question now claimed nor any propriety in its so doing.

Then comes the opinion of the Court of Appeals which takes an entirely new and different view of the situation. They say that the trial Court was wrong in its conclusion, the conclusion from which the defendant appealed; that as a general rule a stipulation in a free pass to the effect that the per-

son who accepts it assumes all risk of injury is enforceable except where the injury results from wantonness or wilfulness; but that the Hepburn Act creates an exception to the general rule; that the permission to issue passes to employees and their families creates a kind of privilege and benefit which may be considered as a part of the consideration paid for the services of the employee; consequently what is considered by that Act as a free pass, along with quite an enumeration of other free passes permitted to be issued, is not a free pass, a gratuity, subject to the law applicable to such passes, but a thing of value, an element in the contract of employment, a contract supported by a valuable consideration.

Is it not perfectly plain, then, that up to the rendition of this opinion and judgment of the Court of Appeals there was absolutely no opportunity for the defendant to raise the question now presented of the proper construction of the Hepburn Act, in any other way or to any greater extent than it had already done in its answer?

The answer alleged that the free pass was issued under the authority of the Hepburn Act, that it was a gratuity, that it was issued upon a certain condition, the benefit of which it claimed. Was it necessary before an attack had been made upon its rights so clearly stated and traced to the Act, to allege what appears upon the face of the Act, that it had not affected the incidental right of contracting for the exemption claimed?

The ruling of the trial Court had not touched the point of construction of the Act; hence the defendant's reliance upon the Act could not have been strengthened by exceptions to that ruling which did not touch the question at issue.

But assuming that the answer has not presented the Federal question involved, we submit that taking the answer, the exceptions to the order striking the plea, the requests to charge and the exceptions to the judgment of the trial Court, it cannot be doubted that the defendant insisted upon a construction of the Act which would have led to a judgment in its favor, that its claims in this respect being duly set up was denied by the Court of Appeals and may be reviewed by this Court.

"The principles to be derived from the cases are these: Where a party to litigation in a State Court insists, by way of objection to or requests for instruction, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being

duly set up, is denied by the highest Court of the State, then the question thus raised may be reviewed in this Court. The plain reason is that in all such cases he has claimed in the State Court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so clearly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

R. Co. v. *Taylor*, 210 U. S., 293.

It is true that in this case last cited the Court says that the defendant objected to an erroneous construction of the Act which warranted a judgment against it and insisted upon a correct construction which warranted on the evidence a judgment in its favor; but we submit that the plaintiff in error should not be held obliged to object to an erroneous construction of which it could possibly have had no notice or even apprehension; that the assertion of a specific right under a statute is the insistence upon a correct construction and an objection to an erroneous one.

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section of 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary."

Nutt v. *Knut*, 200 U. S., 12.

But aside from these considerations, it has been held by this Court that under the rule requiring the opinion of the State Court to be printed in the record the Federal question will be decreed sufficiently claimed and set up if it appear from the opinion that the point was fully considered as a Federal question and decided against the plaintiff in error.

Here the Court of Appeals undertakes to construe the Hepburn Act, and in doing so places a construction upon it which annihilates the right of the carrier claimed by it under this Act to issue a free pass as a gratuity, and with that annihilation the right to impose conditions upon the issuance, acceptance and use of the pass.

In *Phila. Fire Asso.* v. *New York*, 119 U. S., 110, the only evidence that the Federal question had been raised in the State Court was a fact stated in the agreed statement to the effect that the defendant insisted that the statute was "unconstitu-

tional and void, and not a legitimate exercise of legislative power." It appeared, however, from the opinion of the Court below that it had decided the Federal question involved against the plaintiff in error. The Court held that while the agreed statement was not sufficient to show that the Federal question had been specially claimed, resort could be had to the opinion of the Court of Appeals, and sustained the jurisdiction.

In *Powell* v. *Brunswick County*, 150 U. S., 433, it is said: "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State Court could not have given judgment without deciding it, that will be sufficient."

In *Sayward* v. *Denny*, 158 U. S., 180, the Court says: "The right on which the party relies must have been called to the attention of the Court, in some proper way, and the decision of the Court must have been against the right claimed. *Hoyt* v. *Sheldon*, 1 Black, 518; *Maxwell* v. *Newbold*, 18 How., 511, 515. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision." "But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial Court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the Supreme Court in disposing of the rulings below."

In *Home* v. *New York*, 187 U. S., 155, it is said: "Later cases in this Court have expressed the additional thought that if the highest Court of the State assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of Federal right."

In *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S., 291, it is said: "If the highest Court of a State entertains a petition for rehearing, which raises Federal questions, and decides them, that will be sufficient; *Mallett* v. *North Carolina*, 181 U. S., 589; or if the Court decides a Federal question which it assumes is distinctly presented to it in some way." Again, "Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the

record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge."

In *Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S., 177, it is held: "Under the rule of this Court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words, 'specifically set up and claimed' that it was fully considered in the opinion of the Court and ruled against the plaintiff in error."

"It is to be observed that the matter certified by the Supreme Court of Ohio was made by that Court a part of the record, and, if it be considered as having the force of the opinion of that Court, would clearly establish the fact that the Court had considered and decided a Federal question, which, apart from other considerations, would obviously give jurisdiction."

Rector v. *City Deposit Bank*, 200 U. S., 412.

It is true that the question of jurisdiction was decided by the Court upon the simple ground that the action was brought by a trustee in bankruptcy seeking to recover what was asserted to be an asset of the estate under that law. But the Court holds that independently of that position and notwithstanding the fact that the trustee did not specially claim under a Federal statute, the opinion of the Court showed that the Federal question was decided and that that was sufficient to give the Court jurisdiction.

In *Haire* v. *Rice*, 204 U. S., 291, it is said: "Where it clearly and unmistakably appears from the opinion of the State Court under review that a Federal question was assumed by the highest Court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give this Court authority to re-examine that question on writ of error.

"It is contended that neither in the pleadings of the bank nor in any way was any right, privilege or immunity under a Federal statute specifically set up or claimed in the State Courts. The only questions presented by the pleadings, it is urged, were, did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The Supreme Court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt Act. The case, therefore, comes within the ruling in *Nutt* v. *Knut*, 200 U. S., 12."

Eau Claire National Bank v. *Jackman*, 204 U. S., 532.

In *Hammond* v. *Whittredge*, 204 U. S., 538, there was a contest between an assignee of the bankrupt and the assignee in bankruptcy. The former contended that the latter was barred by section 5057 R. S., though it does not appear that the contention was referred to except in the opinion of the Court. This Court held: "But rights under a statute of the United States were claimed by plaintiff in error and that statute was referred to by the Supreme Judicial Court and was an element in its decision. We think also that the decree rendered was final for the purposes of this writ of error. We therefore overrule the motion to dismiss and go to the merits."

In *Chambers* v. *R. Co.*, 207 U. S., 142, it is said: "The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the Courts of the State. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this Court the authority to re-examine that question on writ of error."

In *Seaboard R. Co.* v. *Duvall*, 225 U. S., 477, it is said: "Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the Act, so directly involved that the Court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error."

"The plaintiff contends that the claim of right under the law of the United States and against that under the law of the State was not presented with clearness enough to save it. But as the Supreme Court held the question sufficiently raised and decided it, that objection is not open here."

St. Louis, Iron Mountain & Southern Railway Co. v. *Hesterly*, 228 U. S., 704.

See, also,

Ry. Co. v. *Scales*, 229 U. S., 156.
Ry. Co. v. *McWhirter*, 229 U. S., 265.
Wadkins v. *Company*, 227 U. S., 368.
Adams v. *Croninger*, 226 U. S., 492.
Ry. Co. v. *Miller*, 226 U. S., 513.
Ry. Co. v. *Tobacco Co.*, 228 U. S., 595.
Ry. Co. v. *Schuyler*, 227 U. S., 602.

III.

HAS the COURT of APPEALS of GEORGIA CORRECTLY CONSTRUED the HEPBURN ACT?

This question really goes to the merits of the appeal and is strictly not a subject of discussion upon this motion. However, a discussion of it may throw some light upon the other two questions referred to in the preceding part of this argument.

The question at issue simply is: "Is the pass permitted by the Hepburn Act to be issued to an employee and his family a free pass, a gratuity, or is it an incident of the contract of service supported by a valuable consideration?"

The importance to the railway company of the decision of this question is apparent. Upon it depends the right of the company to issue a free pass as a gratuity, and directly connected with that right, the right to issue it to be accepted and used upon the condition that the user will assume all risk of injury not due to the wilful or wanton act of the company.

The Court of Appeals, as we have seen, took the position that it was not a gratuity, but as incident to the contract of employment might be considered as a part of the consideration paid for the employee's service.

In the first place, the Act refers to such passes as "free tickets," "free passes," "free transportation," and prohibits their issuance except to certain enumerated classes. The fact that "free passes" are prohibited to all except those coming within the excepted classes, necessarily implies that passes issued to those coming within the excepted classes are of the same character as those generally prohibited, that is "free passes."

Again, the enumerated classes comprise, besides employees, ministers, Y. M. C. A. secretaries, inmates of hospitals, and of other charitable institutions, charity workers, indigent, destitute, and homeless persons, and many others between whom and the carrier there could be no contractual relations; and the word "employees" is held to include furloughed, pensioned and superannuated employees.

The fact that the carrier is *permitted* but not compelled to issue passes to employees and their families, is entirely consistent with the idea of gratuity, and inconsistent with that of an obligation.

Again, this Court has decided in the cases of *Louisville R. Co. v. Mottley*, 219 U. S., 467, and *Chicago R. Co. v. U. S.*, 219 U. S., 487, that transportation cannot be furnished for services rendered or to be rendered; that it shall be paid for

by all alike and only in cash. If the railroad company desired to do so, it would be powerless to contract with its employee for transportation for himself and family in return for the services of the employee. It can derive its power to furnish transportation without payment of cash only from the Act, and that provides for *free* transportation to the enumerated classes.

This Court will not, therefore, sustain a construction of the Act which permits the carrier to do what it has declared the carrier cannot do.

Respectfully submitted,

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Jan. 28, 1914.